ILLINOIS POLLUTION CONTROL BOARD
October 17, 1996

WEST SUBURBAN RECYCLING AND ENERGY CENTER, L.P.,	)	
Petitioner,	)	PCB 95-119 and 95-125 (Permit Appeals - Land and Air)
v.	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

RICHARD WILLIAMSON, PERCY ANGELO, JONATHAN SINGER, THOMAS DIMOND AND JOHN LEE APPEARED ON BEHALF OF PETITIONER;

JOHN BURDS, JOHN KIM, LAUREL KROACK, RICHARD BULGER, DANIEL MERRIMAN, CHRISTINA ARCHER, WILLIAM SEITH, ELLEN O'LAUGHLIN, AND GEORGE CAHILL APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by R.C. Flemal):

This matter is before the Board on two permit appeals filed by West Suburban Recycling and Energy Center, L.P. (WSREC) on July 3, 1995. Both permits are for WSREC's proposed facility located in the Villages of Summit and McCook. In the first permit appeal, PCB 95-119, WSREC challenges the Illinois Environmental Protection Agency's (Agency) denial of WSREC's application for a solid waste management development permit. In the second permit appeal, PCB 95-125, WSREC challenges the Agency's denial of WSREC's application for an air quality construction permit[1]. The appeals are consolidated pursuant to Board order of July 7, 1995.

By today's order the Board affirms the Agency's denial of the air permit application, and remands the land permit application to the Agency with instructions to issue the permit.

[1] The Board notes there is a second set of permit appeals currently before the Board, PCB 95-155 and PCB 95-156, that deal with the same proposed facility.

BACKGROUND

WSREC is proposing to build a resource recovery facility designed for the processing, recycling and disposal of municipal solid waste (MSW). Two units of the facility are pertinent to the instant matter: a waste transfer station and a municipal waste combuster (MWC).

WSREC seeks to modify an existing waste transfer station[2] to allow for separation of MSW into various components, including into recyclable components and into fuel for the MWC. A solid waste management developmental permit is required before this action may be undertaken.

WSREC also seeks to construct the MWC, for which a construction permit is required.

WSREC has applied to the Agency for both the developmental permit and the construction permit. The Agency has denied both permit applications. In the instant matter WSREC seeks Board review of the two denials.

PROCEDURAL HISTORY

WSREC filed its application for the solid waste management development permit with the Agency's Bureau of Land (BOL) in May 1994. By letter dated February 27, 1995 the Agency notified WSREC that the land permit application[3] was denied. The Agency cited eight reasons for denial of the land permit.

WSREC filed its application for the construction permit with the Agency's Bureau of Air (BOA) on July 5, 1994. By letter also dated February 27, 1995 the Agency notified WSREC that the air permit application was denied. The Agency cited four reasons for denial of the air permit.

On July 3, 1995 WSREC filed the two instant permit appeals with the Board[4].

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[2] In 1993 the transfer station was issued a permit to accept MSW and segregated landscape waste for consolidation into larger loads for transport to a permitted land disposal facility and landscape waste composting facilities. Construction of the transfer station began in October 1995. The 1993 permit is not at issue in the instant matter.

[3] The solid waste management developmental permit and its application is hereinafter referred to as the "land permit". Similarly, the MWC construction permit and its application is hereinafter referred to as the "air permit".

[4] The Agency has contested the timeliness of filing of these two appeals. By order of February 1, 1996 the Board found that the appeals were timely filed, and the Board finds no reason to overrule that ruling.

The Board held public hearings in this matter before Board hearing officer Michael Wallace for eleven days beginning on February 9, 1996 and ending on March 7, 1996. Both WSREC and the Agency presented witnesses and argument. Oral comment was also received from members of the public.

A post-hearing brief (WSREC Br.) and reply brief (WSREC Reply) were filed by WSREC on May 16, 1996 and July 15, 1996, respectively. The Agency filed a response brief (Agency Br.) on July 1, 1996.

The Board received numerous comments from interested members of the public, both in written form and orally during the evening hearing held at Argo-Summit High School on February 27, 1996. The majority of those comments were from citizens who live nearby the proposed facility and called for the Board to affirm the Agency's denial of the permits. The written filings included, but were not limited to comments from the following: Representative James Durkin, Senator Thomas Walsh, Village of Burr Ridge Trustee Dolores Cizek, the Mayor of the Village of Willow Springs Edward Formento, the Clearing Civic League, the Troubled Members of the Saint John of the Cross Class of 1996, and letters sent to Governor Edgar and copied to the Board.

In addition, the Board received letters from: Congressman William Lipinski and Representative Eileen Lyons who requested additional public hearings, Senator Robert Raica who asked that the Board deny the permits and conduct an in-depth environmental assessment, and letters from the Coalition of Citizens of Illinois for the Full Repeal of the Retail Law. Comprehensive comments were filed by the Chicago Legal Clinic, Inc. on behalf of the Lyons Incinerator Opponent Network and the Summit Citizens Organized for Recycling and the Environment.

Letters in support of the WSREC facility, asking the Board to overrule the Agency's denials, were also filed with the Board. Those written comments included, but were not limited to comments from: the Mayor of the Village of McCook Mil Sero, the Mayor of the Village of Summit Donna Milich, the Construction and General Laborers' Union Local 25, and the Cook County Chamber of Commerce President Gerald Murphy.

On September 24, 1996, at the request of the Agency, the United States Environmental Protection Agency (USEPA) filed a Motion for Leave to File a copy of its Amicus brief and the response from WSREC, along with a copy of the brief and response. On October 2, 1996 WSREC filed an objection and response to the USEPA's Amicus. The Board appreciates the USEPA's consideration in this matter. However the Board has reviewed the subject matter of the amicus and response and finds that the briefs are immaterial to the decision the Board is required to make.

This proceeding has been marked by extensive motion filing. Most of these motions have been addressed by the hearing officer or Board, and are part of the record; they will not be reviewed here. Any outstanding motions are addressed in the opinion below.

THE PERMITTING PROCESS

The Environmental Protection Act (Act)(415 ILCS 5/1 *et seq*.) establishes a system of checks and balances integral to the Illinois system of environmental governance. Concerning the permitting function, it is the Agency which has the principal administrative role under the law. Specifically, the Agency has the duty to establish and administer a permit process as required by the Act and regulations, and the Agency has the authority to require permit applicants to submit plans, specifications and reports regarding actual or potential violations of the Act, regulations, or permits. (Landfill, Inc. v. IPCB, 74 Ill. 2d 541, 387 N.E.2d 258, 25 Ill. Dec. 602, 607 (1978) *citing*, 415 ILCS 5/4.) Further, the Agency has the authority to perform technical, licensing and enforcement functions. It has the duty to collect and disseminate information, acquire technical data, and conduct experiments. It has the authority to cause inspections of actual or potential pollution sources and the duty to investigate violations of the Act, regulations and permits. (*Id*. at 606.)

Regarding permits, the Act provides that it "shall be the duty of the Agency to issue such a permit upon proof by the applicant that the facility will not cause a violation of this Act or of regulations hereunder". When the Agency makes a decision to deny a permit, the Act provides that it must transmit to the applicant a detailed statement as to the reasons for the denial. The statement shall include, at a minimum, the sections of the Act or regulations which may be violated if the permit were granted; the specific type of information, if any, which the Agency deems the applicant did not provide the Agency; and a statement of specific reasons why the Act and the regulations would be violated if the permit were granted. (415 ILCS 5/39(a)(1)-(4)(1994).) Finally, the Act charges that the Agency "shall adopt such procedures as are necessary to carry out its duties under this [the permitting] section". (415 ILCS 5/39(a)(1994).)

After the Agency's final decision on the permit is made, the permit applicant may appeal that decision to the Board. (415 ILCS 5/40(a)(1)(1994).) The Board then holds a hearing between the parties at which the public may appear and offer comment. The question before the Board in a permit appeal is whether the applicant has met its burden of proving that operating under the permit as issued would not violate the Act or regulations. (Oscar Mayer v. IEPA (June 8, 1978), PCB 78-17, 30 PCB 397, 398; John Sexton Contractors Company v. IEPA (February 23, 1989), PCB 88-139, 96 PCB 191; Browning-Ferris Industries of Illinois, Inc. v. IPCB, 179 Ill. App. 3d 598, 534 N.E. 2d 616, 128 Ill. Dec. 434 (2nd Dist. 1989).) It is well-settled that our review in most types of permit appeals, including this one, is not *de novo* but is limited to information submitted to the Agency during the Agency's statutory review period, and is not based on information developed by the permit applicant, or the Agency, after the Agency's decision. *(See* Alton Packaging Corporation v. IPCB, 162 Ill. App. 3d. 731, 516 N.E. 2d 275, 280, 114 Ill. Dec. 120 (5th Dist. 1987).) However, it is the hearing before the Board that provides a mechanism for the petitioner to prove that operating under the permit as granted would not violate the Act or regulations. Further, the hearing affords the petitioner the opportunity "to challenge the reasons given by the Agency for denying such permit by means of cross-examination and the Board the opportunity to receive testimony which would 'test the validity of the information [relied upon by the Agency]'".

(Alton Packaging Corporation *quoting* IEPA v. IPCB, 115 Ill.2d 65 at 70, 503 N.E.2d 343, 104 Ill.Dec. 786 (1986).)

Under the Act, both the Agency and the Board operate under tight statutory decision time frames. The Agency's statutory time to issue a permit decision is 90 days unless waived by the applicant; for the Board it is 120 days unless waived by the petitioner. WSREC has provided various extensions of these deadlines during the pendency of this matter both before the Agency and before the Board.

GENERAL ISSUES

Prior to reviewing the denial points specified by the Agency, we will first address a number of general issues that have been raised in this matter. Some of these issues deal with preliminary matters. Other issues concern continuing arguments made regarding two or more of the denial points that are more economical to deal with here, rather than repeatedly in the analysis of each denial point.

Pre-decisional Stance of Agency Personnel/Mathur Memorandum

A thread that runs through many of WSREC's arguments regarding the merits of the denial reasons cited by the Agency is that the Agency acted inappropriately in its internal review processes. One contention is that some of the "denial points were manufactured" and that the Agency made its decision in part "so as not to present the general public with 'inconsistent' decisions in a 'controversial' project like WSREC". (WSREC Br. at 43.)

WSREC bases these allegations in large part on the so-called "Mathur memo". (Pet. Exh. 120.) This is a memorandum written by the BOA Chief, Bharat Mathur, dated February 23, 1995, four days before the Agency issued its denial letters. The caption of the Mathur memo indicates that the subject matter of the memo is "West Suburban Recycling and Energy Center (WSREC) Summit Municipal Waste Incinerator". WSREC contends that the Mathur memo reveals why the Agency made a number of its decisions, including the final decision to deny both the land and air permits.

The Agency asserts that the Mathur memo should not have been discoverable because it was never delivered to its intended recipient; was prepared by the BOA Chief and not the BOL Chief; was only a draft document; and was not discussed with personnel from the BOL.[5] (Agency Br. at 19.) According to Mr. Mathur's affidavit, to the best of his knowledge and belief, the Mathur memo was never actually finalized, signed and delivered to stated recipient;

[5] The Board notes that in Pet. Exh. 121, Affidavit of Bharat Mathur dated February 22, 1996, Mr. Mathur stated that he prepared the Mathur memo and forwarded it to his counterpart, the Chief of the Bureau of Land, for review and comment, as indicated by the imprinted fax numbers of the Bureau of Air's Permit Section, the Bureau of Land's Permit Section and the Chief of the Bureau of Land.

and it was not incorporated by reference into or expressly adopted by the Agency's final permit decision. (Pet. Exh. 121.) The Agency asserts that the Mathur memo is simply an internal document representing the view of one member of the Agency at a time prior to the final Agency decision. The actual decision is that of the Agency made at the time the final denial (or grant) letter issues.

A decision of the Agency to grant or deny a permit is indeed the decision of *the Agency*. The Mathur memo, as well as any other internal memorandums written by Agency personnel during the permit review process, reflect the thoughts of only one of the decisionmakers prior to the final decision. The only official decision of the Agency is the decision recorded in the denial letters. The cited denial reasons must be proper under the Act. The BOA Chief may have been speculating what the BOL may decide, and now the Board is being asked to speculate as to the intentions behind the author of the Mathur memo. There is insufficient testimony in the record to ascertain Mr. Mathur's intentions and the Board will not speculate as to same. It is accordingly irrelevant whether any Agency personnel, at any time prior to the issuance of the letters, may have personally believed that a different outcome was appropriate.

The Board further notes that at issue here is the degree to which the thought process of the decisionmaker (or decisionmaking personnel) is privileged. The Board, and courts in general, have consistently held that the mind of the decisionmaker may only be invaded under very special circumstances. (Land and Lakes Co. v. Village of Romeoville (June 4, 1992) PCB 92-25; DiMaggio v. Solid Waste Agency of Northern Cook County (January 11, 1990) PCB 89-138; John Ash, Sr. v. Iroquois County Board (July 16, 1987) PCB 87-29, appeal dismissed, No. 3-87-0553 (3d Dist. October 14, 1987), Board opinion at p.12 citing United States v. Morgan, 313 U.S. 409, 85 L. Ed. 1429, 61 S. Ct. 999 (1941); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971); San Luis Obispo Mothers for Peace v. United States Nuclear Regulatory Commission, 789 F.2d 26 at 44, 252 U.S.App. D.C. 194 (1986); Time v. United States Postal Service, 667 F.2d 329 at 335 (2d Cir. 1981); United Steelworkers of America, AFL-CIO-CLC, v. Marshall, 647 F.2d 1189 at 1217, 208 U.S.App. D.C. 60 (1980).) In fact, before an inquiry into an administrator's mental processes can begin, if contemporaneous formal findings exist, there must be a strong showing of bad faith or improper behavior. (City of Rockford v. Winnebago County Board (November 19, 1987) PCB 87-92 noting dicta in Citizens To Preserve Overton Park, 401 U.S. at 420.)

There is insufficient evidence to provide a "strong showing of bad faith or improper behavior" on the part of the Agency and therefore the Board will not invade the Agency's internal deliberations. The Mathur memo was not distributed to WSREC or any members of the public, nor was it offered as an expression of the Agency. WSREC could not have relied upon the Mathur memo, as it was only discovered during the Board hearings. We understand that WSREC contends that the Mathur memo is itself evidence of Agency bad faith and improper behavior. However, we do not accept this reasoning.

As a result, the Mathur memo is irrelevant to the proceeding before it. Therefore, the Board will not consider the Mathur memo, Pet. Exh. 120, in its decision in the instant permit appeals.

The Mathur memo was ruled by the hearing officer as not being subject to public disclosure. The Board hereby denies WSREC's motion (WSREC Br. at 13, Ft. 4 & Reply at 9, Ft. 5) to lift the protective order over Pet. Exh. 120.

We believe as well that an analogous theory also exists based on federal case law which the Board finds instructive in these predecisional issues.[6] This concerns application of predecisional deliberative process (PDP) privilege to the Mathur memo. (Agency Br. at 20-23.) The executive PDP was addressed by the U.S. District Court for the Central District of Illinois in Moorhead v. Lane, 125 F.R.D. 680 (1989). Based upon the Illinois Administrative Procedure Act, the Illinois Freedom of Information Act, and the Open Meetings Act, the Moorhead court found that "a general policy exists in the State of Illinois against requiring the disclosure of predecisional materials". (*Id*. at 684.) The Moorhead court stated that the "primary rationale for the intragovernmental opinion privilege is that effective and efficient governmental decision making requires a free flow of ideas among government officials and that inhibitions will result if officials know that their communications may be revealed to outsiders". (*Id*. at 684.) The court also relied on the notion that "[t]he judiciary…is not authorized 'to probe (*sic*) the mental processes' of an executive or administrative officer. This principle forbids judicial investigation into the methods by which a decision is reached, the matters considered, [and] the contributing influences over the role played by the work of others". (*Id*. citing citations omitted.)

The Moorhead court found that "[t]he policy underlying the privilege recognized in federal courts for federal agencies supports the argument that the same privilege should be recognized for state agencies. This, combined with the emerging policy in the State of Illinois for recognition of such a privilege, persuades the court that it is proper to recognize an executive predecisional deliberative process privilege for state agencies". (*Id*. at 685.)

However, the PDP privilege is not absolute and protects "only expressions of opinions or recommendations in intragovernmental documents; it does not protect purely factual material". (125 F.R.D. at 684.) This qualification is based upon the theory that disclosing facts would not hinder the free flow of advice in government decision making, nor involve improper judicial interference with that process. The courts qualify the privilege by balancing competing interests. The court can examine the official information *in camera* to determine whether the government's interest in non-disclosure outweighs the interests of the litigants and public disclosure.

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[6] See also U.S. v. Farley, 11 F.3d 1385 (1993), where the court found that a memorandum from FTC personnel to the Department of Justice, rendered prior to the Department's decision, was a document within the Department's deliberative process privilege because it was predecisional and deliberative.

Although the Board is not relying upon the PDP, it stresses that the PDP could not be a blanket privilege for all of the Agency's documents. For instance, where documents are sought which may shed light on alleged government malfeasance, the privilege is denied. (Moorhead, *supra*, 125 F.R.D. at 685.) After reviewing the Mathur memo *in camera*, the Board cannot find adequate facts in the record to show that the Agency acted with malfeasance.

In addition to arguments based on the Mathur memo, WSREC contends at various places that other Agency personnel at times prior to issuance of the denial letters held views different than those expressed in the denial letters. For the same reasons we articulate with respect to the Mathur memo *supra*, we find that inquiry into these predecisional positions are irrelevant to the Board's decision here.

Along the same lines as the Mathur memo, WSREC questions other Agency internal actions prior to the issuance of the denial letters. The Board addresses those contentions below.

The legislature has put an affirmative responsibility on the Agency to perform an evaluation to ascertain whether the applicant would violate the Act if the permit were issued. (415 ILCS 5/39 (1994).) The Agency is not necessarily limited to information contained within the four corners of the permit application, but can conduct the evaluation by gathering information from either within the Agency or outside the Agency.

The reality of the Agency's fact finding mission is that the permit reviewer will not conduct the review with blinders. It is clear from the record in this case that the members of the BOL met with members of the BOA, and groups of persons from various bureaus within the Agency (i.e. the technical review committee "TRC") met to discuss WSREC's permit applications. Obviously, such meetings are both appropriate and necessary to the Agency's decision-making process.

Although WSREC implies that such meetings and exchanges of ideas deprived it of the opportunity to notice or the opportunity to rebut facts (WSREC Br. at 5-16), the Board finds no such deprivation. WSREC insinuates the Agency's coordinated review process is unfair, but does not contest the Agency's authority to promulgate regulations such as 35 Ill. Adm. Code 170, Procedures for Coordinated Permit Review, and the Board finds nothing in the record to indicate any such theory.

Completeness of the Air Application/Sutton Letter

WSREC claims that the Agency's own documents admit that WSREC's air application was complete. WSREC accordingly contends that any Agency reason for denial premised on alleged insufficient information should be reversed.

WSREC's claim is based largely on the Mathur memo, augmented by a December 23, 1994 letter sent from BOA Permit Section Manager, Donald Sutton, to the USEPA (Sutton Letter) (Pet. Exh. 27), and the USEPA's January 26, 1995 response (Pet. Exh. 29). We have dealt with the Mathur memo, *supra*.

The Sutton Letter solicits USEPA's comments regarding some rather specific technology and emission limitations questions concerning WSREC's proposed MWC facility. The USEPA's response addresses these narrow issues.

The Sutton Letter does contain the statement, "[t]he IEPA, has found the application to be complete". (Pet. Exh. 27 at para. 3.) We find this statement no basis for leapfrogging to the conclusion that the permit is required to issue. An application that is complete can not be equated to an application that is meritorious. Also of note in the Sutton Letter is the statement that, "the proposed air pollution control technologies and performance specifications for the MWC meet all applicable federal and state standards".[7] (*Id*.) Again, as was the case with the Mathur memo, the Agency is not bound by this predecisional finding; in reality the Agency did not make its final determination until two months later.

Moreover, the Sutton Letter's statements notwithstanding, it is clear from the letters taken together that neither the Agency nor the USEPA viewed WSREC's application as containing all information necessary to grant the requested MWC permit. The USEPA letter explicitly notes that "[a]lthough the State has not yet received a complete application for this source, we are happy to respond to your December 23, 1994 request to review the technology proposed for this project". (Pet. Exh. 29 at para. 1, emphasis added.) Furthermore, the USEPA letter explicitly notes additional criteria, beyond emission limitations, that require review prior to issuance of a permit.

The Board believes that the Sutton Letter and the USEPA response are similar to the Mathur memo and similarly do not bind the Agency. (See *supra*.)

[7] The Board notes that the tables attached to the Sutton Letter show the Agency's determinations on December 23, 1994 regarding WSREC's proposed control technologies and BACT.

Disposition of Petitioner's Exhibit 129

There are outstanding several motions[8] related to Petitioner's Exhibit 129. Petitioner's Exhibit 129 consists primarily of information regarding the Sutton Letter, the USEPA response to the Sutton Letter, and the two Agency permit denial letters of February 27, 1995.

The primary issue is a Request for Admissions (Admissions) filed by WSREC which the hearing officer admitted into evidence because the Agency had failed to timely file its answers thereto and had not shown good cause for such failure. We affirm the hearing officer's ruling finding unpersuasive the Agency's new argument that WSREC waived its right to rely on the Admissions because WSREC elicited testimony at hearing on each of the questions posed in the Admissions. The sequence of events involved with this issue is important.

On January 16, 1996 WSREC filed its request for Admissions with the Board. The Agency did not answer the Admissions within 20 days and did not request an extension of time. Therefore pursuant to 35 Ill. Adm. Code 103.162(c), "each of the matters of fact and the genuineness of each document of which admission is requested is admitted". Hearings began on February 9, 1996. On February 29, 1996 WSREC moved at hearing to have such Admissions admitted into evidence as part of Petitioner's Exhibit 129. (Tr. 2155.) The Agency objected arguing that at most it was only one day late in filing its answer. The Hearing Officer reserved ruling on admissibility to allow the Agency time to file its objection in writing and give WSREC time to reply. (Tr. 2156.) On March 5, 1996, the Agency filed its objection in writing, and WSREC filed its reply that same day. The Agency explained that its answer was late primarily due to its' limited resources to handle discovery and hearing preparation. Additionally, the Agency renewed its request that the answer be allowed, having shown good cause. On March 6, 1996, the Hearing Officer admitted into evidence Petitioner's Exhibit 129, including the Admissions stating that the Agency had not shown good cause for the late filing of its' answer.[9] (Tr. 2429-2431.) On March 7, 1996, the hearings concluded, at which time the Agency moved for reconsideration of the Hearing Officer's ruling. (Tr. 2706-2708.) The Hearing Officer denied the motion and Pet. Exh. 129. remained admitted. (Tr. 2707.) The Agency then mentioned briefly for the first time that

[8] On June 27, 1996 the Agency filed a Motion to Strike Petitioner's Exhibit 129 and any References thereto and Alternatively for Other Relief. WSREC filed a response on July 2, 1996. On July 15, 1996 the Agency filed a Motion for Leave to Reply to WSREC's Response. On July 16, 1996 WSREC filed an objection to the Agency's Motion for Leave to Reply. Although the Board's procedural rules do not allow for a right to reply except as permitted by the Board or hearing officer to prevent material prejudice (35 Ill. Adm. Code 101.241(c)), the Board will accept the Agency's and WSREC's July 15th and 16th motions respectively in this instance.

[9] At that time the Agency's counter motion for an extension of time or leave to file a response was denied by the Hearing Officer, but the Hearing Officer did allow the Agency to raise the issue further with the Board. (Tr. 2430.)

WSREC had allegedly waived its right to rely upon the Admissions. The Hearing Officer then suggested that the Agency address it motion for reconsideration to the Board. On June 27, 1996, approximately four months after hearing, the Agency made its waiver argument in a post-hearing motion before the Board.

In its post-hearing motion, the Agency argues that WSREC waived its right to rely upon the Admissions because WSREC elicited testimony at hearing on each of the questions in the Admissions. The Agency asks the Board to strike the Admissions contained in Petitioner's Exhibit 129 and all references to the same, or in the alternative, that the Board strike specific portions. WSREC disagrees that it elicited the same information at hearing as that contained in the Admissions. WSREC also argues that the Agency did not raise its waiver argument until well after it was offered into evidence, and that the Agency may not raise new objections which it failed to raise earlier in its original objection.

A specific objection to evidence, as was the case here, is a waiver of other grounds. (Central Steel & Wire Co. v. Coating Research Co., 53 Ill.App.3d 943, 369 N.E.2d 140, 11 Ill.Dec. 686 (1st Dist. 1977).) And generally a failure to object at the original proceeding constitutes a waiver of the right to raise the issue on appeal. (St. Clair County v. Village of Sauget (July 1, 1993) PCB 93-51; E & E Hauling, Inc. v. PCB, 107 Ill.2d 33, 481 N.E.2d 664, 666, 89 Ill.Dec. 821 (1985); People v. Carlson, 79 Ill.2d 564, 404 N.E. 2d 233, 38 Ill.Dec. 809 (1980).) The Agency failed to raise the waiver argument when objecting to the admission of Pet. Exh. 129 at hearing (February 29th), and when given the opportunity by the Hearing Officer to file its objection in writing, it again failed to raise the waiver argument (March 5th). The Agency objected at hearing, and based its Response to WSREC's Motion for Admission of Fact, upon a showing of good cause, not based upon waiver. The Agency raises the waiver argument for the first time to the Board in its motion post-hearing (June 27, 1996), approximately four months after WSREC moved to have Pet. Exh. 129 entered into the record.

The Agency is requesting that the Board review the Hearing Officer's ruling on admissibility. The Agency now asks the Board to consider arguments not properly raised before the Hearing Officer, in essence getting two bites at the apple. The Board will not deviate from precedence in this matter. The Board finds that the Agency has waived any claim of waiver on the part of WSREC by failing to raise the waiver argument when it objected at hearing, or in its written motion to the Hearing Officer. For the same reasons cited above, the Board also rejects the Agency's request to, in the alternative, strike requests Nos. 10, 12, and 14 as being conclusions of law. In so doing, the Board will not consider the Agency's untimely response to the Request for Admissions and will not strike Pet. Exh. 129. .

Wells Letters/Notice of Insufficiency and Procedural Safeguards

WSREC contends that, because the Agency did not contact it prior to issuing the land permit denial[10] letter to notify it of the application's alleged deficiencies, the Agency's action denied WSREC due process. WSREC asserts that this bars the Agency from claiming that the application lacked such necessary information. (WSREC Br. at 22.)

In 1986 when reviewing the Agency's permit review procedures and the proper standard of review the Board is to give those Agency decisions, the Supreme Court in EPA v. PCB, 104 Ill.Dec. 786, 115 Ill.2d 65, 503 N.E.2d 343 (1986) stated that:

> Unlike the procedures required under section 39.2 and 40.1, the permit process under sections 39(a) and 40(a)(1) does not require the Agency to conduct any hearing. Consequently, no procedures, such as cross-examination, are available for the applicant to test the validity of the information the Agency relies upon in denying its application. As the appellate court noted, the procedure before the Agency has none of the characteristics of an adversary proceedings. The safeguards of a due process hearing are absent until the hearing before the Board.
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> 104 Ill.Dec. at 788.

Subsequent to the Illinois Supreme Court decision above, the appellate court has reviewed the Board's decisions regarding the Agency's permitting procedures. In particular, WSREC relies on the appellate court's decision in Wells Manufacturing v. IEPA, 195 Ill. App. 3d 593, 552 N.E.2d 1074, 142 Ill. Dec. 333 (1st Dist. 1990). According to WSREC, the Agency had the WSREC application for nearly nine months and should have contacted WSREC if there were deficiencies or questions regarding the application which could have been easily cured by submitting additional information.

The First District Appellate Court in Wells Manufacturing Co. specifically addressed the situation where the Agency did not request additional information from the permit applicant prior to denial of the application. In Wells, the Agency denied a permit based upon a potential violation of the Act without providing Wells an opportunity to submit information to disprove the potential violation. The court determined that all of the parties' arguments could be resolved by determining whether the Agency followed proper procedures in denying Wells' renewal application. The court found that Wells did not have an opportunity to present additional evidence which would disprove the potential violation of the Act before its renewal application was denied. (*Id*. at 336.) The court recognized that, although 35 Ill. Adm. Code

[10] The air application before the BOA is not at issue here because it is uncontested that the BOA did contact WSREC repeatedly and requested additional documentation for the air application. (WSREC Br. at 2.)

201.153 (1986) provided a procedure whereby the Agency could request additional information from a permit applicant, the provision was discretionary. The Wells court cited several problems with the Agency's procedure of not requesting additional information from the permit applicant, including that the applicant never had an opportunity to proffer evidence to the Agency (to be included as part of the record before the Board) that it would not pollute. The Wells Letters serve a function not otherwise addressed in the Agency's permitting procedures.

The Wells court relied upon the federal court's reasoning in Martell v. Mauzy, 511 F. Supp. 729 (N.D. Ill. 1981). Martell addressed a landfill operator's due process rights to a hearing regarding the Agency's denial of an operating permit for a facility to which the Agency had already granted a developmental permit. The Martell court found that a protected property interest was at stake, and that the lack of a pre-denial hearing deprived the landfill operator of his due process of law. (*Id*. at 740.) Although the Wells court did not go as far as Martell to require a pre-denial hearing, the Wells court recognized that the same due process concerns were present in that "the manner in which the Agency compiled information denied Wells a fair chance to protect its interest". (142 Ill.Dec. at 337.)

The Third District Appellate Court in Reichhold Chemicals, Inc. v. IPCB and IEPA also found a lack of fundamental fairness of an Agency proceeding where the applicant was denied the permit because it *might* violate the Act, without giving the applicant the opportunity to submit more information prior to denying the permit. (204 Ill. App.3d 674, 561 N.E.2d 1343, 149 Ill. Dec. 647 (3d Dist. 1990).) The Reichhold court noted that in Wells, "the applicant's property interest in the renewal of an operating permit is analogous to the property interest at stake when an applicant sought its initial operating permit after constructing new landfill trenches under a developmental permit, as was the case in Martell v. Mauzy (cite omitted) where it was held that the failure to hold a 'predenial hearing' deprived the applicant of due process of law". (149 Ill. Dec. at 650.)

Since the Wells decision, the Board has repeatedly examined whether the Agency informed the applicant about possible denial reasons in an effort to acquire additional information from the permit applicant during the review process. For instance, relying on Wells and Martell, the Board in Grigoleit Company v. IEPA ((November 29, 1990) PCB 89-184, found that the Agency violated Grigoleit's due process rights because it did not give the company an opportunity to submit evidence in rebuttal to the denial reasons during the application process for its renewal permit. The Agency's notification to the permit applicant, affording it the opportunity to address concerns or questions the Agency may discover during the permit appeal review process, has become commonly known within the Agency as "Wells Letters".

It is uncontested that BOL failed to contact WSREC during the application process, and failed to alert WSREC of any deficiencies or requested any additional information regarding the denial points before the land application denial letter was sent. WSREC argues, as did Wells, that it could have provided the Agency with sufficient information to satisfy the

requirements or address the issues cited in the BOL denial points, if only the Agency had requested such information.

Like the Wells court, the Board today will not go so far as to require that the Agency hold pre-denial hearings during its permitting process. However, the Board must determine what, if any, procedural due process rights attach to WSREC's application. WSREC filed an application for a solid waste management development permit with the Agency. WSREC did not hold a prior solid waste management development permit, so this was not an application for an operating permit where WSREC already had the developmental permit, nor a renewal permit application. Therefore, within the meaning of Martell or Wells, WSREC did not hold any property interest in the solid waste management development permit which would assure the accompanying heightened due process rights.[11] WSREC merely held an expectation to a property interest in the solid waste management development permit.

The Board today does not intend to expand the relevant caselaw to finding that a property interest exists as early as the development permit stage. Even though the Board believes that in the interest of judicial economy the Wells Letters, or some other pre-denial notification, should have been sent to WSREC prior to the land application denial, we do not find that such omission results in the violation of any due process rights so as to require the permit to issue by operation of law.

From another perspective, the Board notes that any applicant who wishes to obtain a permit personally bears the burden of submitting a meritorious application. To affirmatively require that the Agency seek from the applicant any and all information necessary to make an initial application successful would be tantamount to shifting the applicant's burden to the Agency; this the Board will not do.

Agency Failure to Timely Comply with Section 39(a) of the Act

WSREC requests that the Board either strike or give "little weight" to several of the denial points cited in the Agency's February 27, 1995 letter denying the land permit[12]. (WSREC Br. at 19 *et seq*.) WSREC bases its plea on the Agency's failure to comply with Section 39(a) of the Act.

It is well settled law that the Agency's denial letter frames the issues on appeal. (Pulitzer Community Newspapers, Inc., v. IEPA (December 20, 1990) PCB 90-142; Centralia Environmental Services, Inc. v. IEPA (May 10, 1990) PCB 89-170; City of Metropolis v. IEPA (February 22, 1990) PCB 90-8.)

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[11]See also Medical Disposal Services v. Industrial Fuels and Resources, No. 1-95-2892, 1-95-2908, 1996 Ill. App. Lexis 697, (1st Dist. Sept.18, 1996) siting approval alone is not a property right.

[12] This issue does not arise with regards to denial of the air permit application.

Section 39(a) imposes several explicit requirements upon the Agency when the Agency denies a permit application. Among these is a requirement that the Agency in its denial statements identify the sections of the Act or regulations that would be violated if the permit were to issue:

* * *

> If the Agency denies any permit under this Section, the Agency shall transmit to the applicant within the time limitations of this Section specific, detailed statements as to the reasons the permit application was denied. Such statements shall include, but not be limited to the following:
>
> 1. the section of this Act which may be violated if the permit were granted;
>
> 2. the provision of the regulations, promulgated under this Act, which may be violated if the permit were granted;
>
> * * *
>
> 415 ILCS 5/39(a) (1994)(*emphasis added*).

The Illinois Supreme Court itself has held that Section 39(a) requires that each denial point be supported by identification of the specific provisions in the Act or Board regulations that the Agency believes may be violated if the permit were to issue. (IEPA v. IPCB, 86 Ill. 2d 390, 405-406, 427 N.E. 162, 169-170 (1981).) In the case at bar, the Agency "acknowledges that not all of the land denial points identified the provision of the Act or Board regulation which would or may have been violated if the permit had issued". (Agency Br. at 26.) Specifically, the Board notes that the February 27, 1995 land permit denial letter fails to cite the provisions of the Act or regulations in denial points 1, 2, 3, 4, 5, 6, and 8. Accordingly, with respect to these denial points the Board finds that the Agency has failed to comply with Section 39(a).

The purpose of Section 39(a) is to require the Agency to issue its decision in a timely manner with information sufficient for the applicant to determine the bases for the Agency's determination. (Metropolis; Centralia Environmental Services, Inc.[13]; Grigoleit v. IEPA (November 29, 1990) PCB 89-184.). Indeed, an applicant's right to a review of the Agency's decision before this Board would be rendered empty were the applicant denied knowledge of the reasons why a permit application was denied (i.e., what specific sections of the Act or

[13] See the Board's interim opinion and order in Centralia Environmental Services, Inc. v. IEPA (May 10, 1990) PCB 89-170, 111 PCB 111, for a comprehensive analysis of the Agency's responsibilities under Section 39(a), as well as the limits on the Board's statutory duty associated with Section 39(a).

regulations may be violated if the permit were granted). Consistent with this theory the Board articulated in Centralia Environmental Services, Inc. that:

> [i]n order for an applicant to adequately prepare its case in a permit review before the Board the applicant must be given notice of what evidence it needs to establish its case. The requirement that the Agency provide the applicant with the specific sections of the Act and regulations which support permit denial is consistent with the statutory framework of the Act which requires that the Agency render its initial permit decision and the Board render its permit review decision within specified time periods.
>
> (May 10, 1990) PCB 89-170, 111 PCB 111, 116.[14]

In the case at bar, WSREC was apprised of the sections of the Act and Board regulations that the Agency contends support seven out of the eight land permit denial points too late in the proceeding. This information was not discovered until WSREC extracted it via depositions, interrogatories (Pet. Exh. 111), and direct examination at hearing (e.g., Tr. 37, 49, 54, 60-62, 66, 385, 386)[15]. Although WSREC's industry in obtaining this information from the Agency may have allowed WSREC to competently argue the dismerits of the denial reasons, WSREC should never have been put in the position of needing to seek out the information.

Accordingly, based on the Agency's failure to comply with Section 39(a), we hereby strike denial points 1, 2[16], 3, 4, 5, 6, and 8, as found in the Agency's land permit denial letter of February 27, 1995.

In most circumstances, the Board would be inclined to end its inquiry into these denial reasons here. However, both the nature of the conflict and the presence of the well-pled record in the instant case persuades us that it would be in the interests of the parties and any possible reviewing court, as well as in the public interest of avoidance of future conflicts of the

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[14] The facts specific to Centralia Environmental Services, Inc. v. IEPA and City of Metropolis v. IEPA , unlike the situation at hand, allowed the Board to remand the matter back to the Agency to remedy the incompleteness of the denial letter.

[15] See also Pulitzer Community Newspapers, Inc., finding that fundamental fairness would be violated if the Agency were free to cite additional statutory and regulatory reasons for denial for the first time at the Board hearing.

[16] WSREC's outstanding motion to strike denial point 2 based on alleged Agency's failure to comply with Section 39(a), filed on January 26, 1996, is also hereby granted.

same nature, for the Board to squarely address all of the denial reasons as though they remained unstruck. We accordingly will proceed along that path.

Protective Order Concerning Agency Manuals

Pursuant to a Hearing Officer order, the Agency has sought and was granted a protective order for the BOL's Permit Section Procedures Manual and the BOL's Administrative Procedures Interpretation Manual. WSREC has renewed its objection to the protective order. (WSREC Br. at 21.) The Board has reviewed that request and WSREC's objection pursuant to Board Rule 101.161(b)(3). We find that the Agency did not adequately justify such protective order; the seal on both manuals is hereby removed.

LAND PERMIT DENIAL

The Agency has cited as reasons for its denial of the land permit application eight separate denial points. (See Exh. 8, February 27, 1995 denial letter.) WSREC contests each of the eight. As we noted *supra*, even though we today strike seven of the eight denial points due to failure of the Agency to timely comply with the requirements of Section 39(a) of the Act, we here address all of the denial points in the interests of the parties and the public.

The Board notes that WSREC's reoccurring arguments in the denial points that go to the nature of the mind of the decisionmaker, the predecisional posture of the Agency, and the Agency's internal review procedures, have been addressed *supra* and will not be addressed in each and every denial point below.

Land Denial Point #1: Alleged Failure to Address Painted Wood

The first point which the Agency cites as the basis for denial of the land permit is:

> The permittee failed to describe the acceptance criteria for incoming shipments to [sic] construction/demolition debris so as to prevent the acceptance of painted wood.

The outstanding portion of WSREC's contention is that denial point #1 is based on hazardous waste provisions that the Agency incorrectly applied to WSREC's non-hazardous land permit application.[17]

The Agency's legal bases for denial point #1, according to Mr. Harmon at hearing, were Sections 21(d) and (f), with 21(f) the more critical. According to the Agency:

[17] Any statements made by WSREC in its brief regarding paint chips will not be considered in this matter because that issue was raised after the Agency's denial and, therefore, is inappropriate for the Board's review in this permit appeal.

> Section 21(f) prohibits the storage, treatment or disposal of hazardous waste without a permit issued by the Agency pursuant to the Resource, Conservation and Recovery Act ("RCRA"). If Petitioner were to accept painted wood that tested characteristically hazardous, then section 21(f) would be violated.
>
> In response, Petitioner is unable to point to any provision in its application which addresses this concern.
>
> (Agency Br. at 30.)

It is agreed between the parties that WSREC has no intent of operating a RCRA facility. (WSREC Br. at 19, 20; Agency Br. at 29.) WSREC only sought permission to accept MSW, or general municipal refuse; WSREC repeatedly emphasized throughout its application and various forms that the facility would accept only MSW; and the definition of waste in its waste quality assurance plan incorporated hazardous materials as unacceptable waste. (WSREC Reply at 13.) Although WSREC may remove hazardous materials that come from a household source in its inspection, WSREC argues, "[t]he fact that WSREC will do this in some cases does not entitle the Agency to require WSREC to segregate the MSW stream". (WSREC Reply at 15.)

The Agency maintains, "(t)he issue is not whether Petitioner intends to accept hazardous waste, but rather whether information in the application adequately demonstrates how hazardous waste would be screened". (Agency Br. at 29.) Mr. Harmon testified that the Agency was concerned with the acceptance of painted wood that might test characteristically hazardous for lead. (Agency Br. at 29, Tr. 46.)

Simply stated, WSREC argues that, because construction or demolition debris (which includes painted wood) is explicitly identified as one of the components of MSW in the Act (415 ILCS 5/3.21 (1994)), construction or demolition debris by statutory definition is excluded from "even theoretically be[ing] considered hazardous waste under the Act" (WSREC Reply at 14). WSREC claims that the Agency presented no expert testimony to establish that painted wood is hazardous waste or that its disposal at the facility presents any particular problem. (WSREC Br. at 22.)

The Agency argues that special or hazardous waste may be commingled with incoming construction and demolition debris and may require special handling by WSREC (as evidenced in WSREC's explanation of handling any asbestos-containing waste which may be discovered in the construction and demolition debris).

The Board has considered both parties' interpretation concerning the status of painted wood contained in the MSW stream. Under Board regulations, all solid wastes must be

regulated as either a hazardous waste (RCRA Subtitle C) or a non-hazardous waste[18]. A solid waste must be regulated as a hazardous waste if it meets the criteria specified under the definition of hazardous waste at 35 Ill. Adm. Code 721.103. A solid waste must be regulated as a non-hazardous waste if it does not meet the hazardous waste definition criteria or if the waste is excluded from the definition of hazardous waste pursuant to 35 Ill. Adm. Code 721.104. For example, the Board's RCRA regulation at Section 721.104(b) excludes "household waste" from the hazardous waste definition. Therefore, even if household waste possesses characteristics of hazardous waste, the regulations allow such waste to be managed as a non-hazardous solid waste.

In the present context, the initial question must be whether the painted wood received at the WSREC facility is indeed hazardous waste. (See 35 Ill. Adm. Code 721.103.) We accept as fact that painted wood has the potential for testing hazardous for lead; it is well known that wood historically has been painted with lead-based paints and that lead-based paints are hazardous materials. Therefore, for purposes of discussion, we can assume that painted wood, meeting the criteria for hazardous waste, may enter the waste stream at the WSREC facility.

The next question is whether the painted wood is included in the exemptions from the definition of hazardous waste. Characterizing painted wood as construction or demolition debris[19], the Board looks to its regulations at 35 Ill. Adm. Code 721.104. Construction and demolition debris are not specifically exempted from the definition of hazardous waste in the Boards regulations.

Examining the exemptions outlined in the Board's regulations, we find that Section 721.104(b)(1) exempts "household waste" from the definition of hazardous waste, where "household waste" means any waste material derived from households. However, there is no certainty that the construction or demolition debris received at the WSREC site will or will not be "household waste". If the construction or demolition debris is generated by commercial or industrial activities, the generator of the debris may need to perform a hazardous waste determination in accordance with 35 Ill. Adm. Code 722.111.

WSREC's facility will only be exempt from managing hazardous wastes under Part 721, where according to 721.104(b)(1):

> A resource recovery facility managing municipal solid waste shall not be deemed to be treating, storing, disposing of or otherwise managing hazardous wastes for the purposes of regulation under this Part, if such facility:

---

[18] Non-hazardous solid waste includes RCRA Subtitle D wastes, non-RCRA special wastes, etc.

[19] Both parties characterize the painted wood in their briefs as construction and demolition debris.

A) Receives and burns only:

i) Household waste (from single and multiple dwellings, hotels, motels and other residential sources) and

ii) Solid waste from commercial or industrial sources that does not contain hazardous waste; and

B) Such facility does not accept hazardous waste and the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

* * *

Therefore, WSREC's facility could burn, without regulation under Part 721, household waste (which may include painted wood that tests characteristically as hazardous solid waste) and commercially generated waste (which may include painted wood, but only if it is not hazardous waste pursuant to regulations). However, pursuant to 721.104(b)(1)(B), WSREC cannot accept hazardous waste and must establish contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received or burned on site. If WSREC did accept hazardous waste, it would be violating Section 21(f) of the Act, which would require WSREC to obtain a RCRA permit.

In accordance with 35 Ill. Adm. Code 721.104(b)(1)(B), WSREC has affirmatively stated in its application, and throughout these proceedings, that it will not accept hazardous waste. Additionally, WSREC has outlined its inspection plan to prevent entry into its facility of unacceptable wastes, such as hazardous waste, in its land permit application (Pet. Exh. 14 at 18) and in its post-hearing brief (WSREC Br. at 3-4). According to WSREC, the transfer station will consist of a waste receiving building where the contents of the delivery trucks will be dumped onto the tipping floor and inspected for unacceptable items by front-end loader operators. (Pet. Exh. 14 at 18.) Loads of unacceptable waste will be rejected and redirected off-site. Specifically outlined in WSREC's application, "construction/demolition debris will be unloaded and managed in an isolated area of the waste receiving building to prevent co-mingling with MSW". (*Id*.) Any "[u]nacceptable items detected during this operation will be separated for removal from the Site". (*Id*.)

There is no assertion or showing that the inspection plan provided by WSREC is insufficient to meet the requirements of 721.104(b)(1)(B). There is no authority cited by the Agency that WSREC provide a specific inspection plan to prevent the acceptance of painted wood, and the Board can find no such requirement. Therefore, the Board can find no reason why WSREC's stated inspection plan regulating the acceptance of construction/demolition debris is insufficient to meet the requirements of the Board's regulations and the Act.

The Board believes the Agency insufficiently justified its concern over the acceptance of painted wood, including why it believes that the facility will be receiving painted wood from commercial generators which would not be exempt from Subtitle C regulations.

The Board notes that this is exactly the type of situation where contacting the applicant would have been appropriate. However at hearing Mr. Harmon admitted that he did not raise painted wood as a problem needing further clarification with WSREC during the permit review. (Tr. 48.) WSREC could not list procedures whereby every conceivable item which may or may not enter the MSW stream would be separated out. WSREC's application repeatedly stated that the facility would be accepting general municipal refuse, and not hazardous waste. If the Agency doubted WSREC's ability to perform such acceptance pursuant to WSREC's stated inspection plan, the proper Agency course of action would have been to contact WSREC to provide it the opportunity to address the Agency's uncertainty.

Instead, the Agency simply cites to Section 21(f) as legal authority for denial point #1. The only way that the Agency could rely on Section 21(f) to support this reasoning is if the Agency is concerned that WSREC would, due to its acceptance of painted wood, inadvertently operate a RCRA facility. Neither WSREC nor the Agency contends that the facility here at issue is intended to be a RCRA facility. Obviously, the Agency believes that WSREC needed to prove that it will not be a RCRA facility by showing that it will "prevent the acceptance of painted wood" (February 27, 1995 land permit denial letter at denial point #1). We do not see how the information given in the application leads to the conclusion either that screening the MSW for painted wood is required beyond what WSREC has provided, or that operating without a screening-for-painted-wood plan would likely cause a violation of Section 21(f).

The Board agrees that possible acceptance of hazardous waste at a permitted facility is a legitimate concern of the Agency. However, it is the broad nature of the Section 21(f) prohibitions that the Agency cites as the legal basis for denial point #1 which is disturbing. Section 21(f) is essentially a prohibition against operating an unpermitted RCRA facility. The Board believes that, without further justification in the record, there is an insufficient nexus between Section 21(f) and the possible acceptance of non-household waste painted wood which might be part of the MSW stream.

If the WSREC facility becomes operational and accepts hazardous waste, despite its outlined inspection program, the Agency may at that time choose to require a Section 21(f) RCRA permit, or enforce against WSREC based on a permit which prohibits accepting hazardous waste.

Lastly, the Board will now examine the Agency's other legal support for denial point #1. Section 21(d), in contrast to Section 21(f), specifically states that Section 21(d) shall not apply to hazardous waste. (415 ILCS 5/21(d).) The Agency does not pursue its arguments based on Section 21(d), presumably because it recognized that it could not argue Section 21(d) was its legal authority to prohibit accepting hazardous waste or painted wood, when Section 21(d) does not apply to hazardous waste. Therefore, accepting that the Agency's stated basis

for denial point #1 was WSREC's potential acceptance of hazardous waste, the Board finds that Section 21(d) is an insufficient legal basis to support denial point #1.

Therefore, having found that Sections 21(d) and (f) of the Act would not be violated were the permit to issue, the Board finds that denial point #1 is an insufficient basis for denial of the requested permit.

Having so found, the Board emphasizes that rejection of the Agency's denial point #1 does not constitute license for WSREC to violate regulations governing the management and disposal of hazardous waste. Violation of such regulations remain subject to full enforcement. Compliance with a permit is never a defense against violation of the Act or of a regulation promulgated pursuant to the Act. (Landfill, Inc. *supra* at 265, Grigoleit Company v. IEPA,. 245 Ill.App.3d 337, 613 N.E.2d 371, 184 Ill.Dec. 344 (1993).)

Land Denial Point #2: Alleged Failure to Address Acceptance of Light Industrial Waste

The second basis for denial cited in the Agency's February 27, 1995 letter is:

> The permittee failed to describe the acceptance criteria for incoming shipments of light industrial wastes so as to prevent the acceptance of special wastes. The permittee also failed to define light industrial wastes.

There is some uncertainty over denial point #2 in the record regarding both when the Agency apprised WSREC of the denial support statements and which support reasons the Agency stands by. WSREC contends that it first learned of the Agency's legal basis for denial point #2 in response to interrogatories sent to the Agency, at which time Mr. Harmon of the Agency verified that Sections 3.17 and 3.27 of the Act, along with 35 Ill. Adm. Code 807.206(a), were the provisions that would be violated were the permit to issue. (WSREC Br. at 24; Pet. Exh. 111, dated 1/17/96.) The Agency subsequently added Section 39(c) of the Act as an additional denial basis after receiving WSREC's Motion to Strike Denial Points #2 and #7 (filed with the Board on January 26, 1996). According to WSREC, it was not aware that Section 39(c) also formed the basis of the Agency's denial until one week prior to hearing, and accordingly WSREC argues this behavior violated both the Act and WSREC's due process. (WSREC Br. at 24.)

The Agency states that it did give Sections 3.17, 3.27, and 39(c) of the Act, and 35 Ill. Adm. Code 807.206(a) as the legal basis for denial point #2 in response to interrogatories. (Agency Br. at 30-31.) Nevertheless, at hearing only Section 39(c) was cited by Mr. Harmon as support of denial point #2 (Tr. 49), and the Agency in its brief asserts that it does not claim

that Sections 3.17 or 3.27 are substantive legal bases for denial point #2[20], but only that those sections provided background or explanation.

As a result the Board will only examine 35 Ill. Adm. Code 807.206(a) and Section 39(c) of the Act. Section 807.206 is a provision in the Board's waste disposal regulations. The pertinent part is subsection (a):

> Section 807.206 Permit Conditions
>
> (a) As provided by Sections 39(a) and 21(d) of the Act, the Agency may impose such conditions in a permit as may be necessary to accomplish the purposes of the Act, and as are not inconsistent with Regulations promulgated by the Board thereunder, including periodic reports and full access to adequate records and the inspection of facilities, as may be necessary to assure compliance with this Act and with regulations and standards adopted thereunder;

WSREC contends that Section 807.206(a) is not appropriate support for any of the denial points because Section 807.206(a) only grants the Agency authority to condition permits, not to deny them. (WSREC Br. at 25, 28, 31.) The Agency states that its intent in citing to Section 807.206(a) in denial point #2 was to explain that if "the permit application were to have no other defects, the concern expressed in the denial point may have been memorialized through a permit condition". (Agency Br. at 32.) Whether or not the Agency could have, were the circumstances different, included denial point #2 as a condition is irrelevant**.** What the Agency could have done in a different situation, with different facts, could not be sufficient to support denial in this matter, with these facts.

We agree that Section 807.206(a) is an inappropriate basis of support for a permit denial. To be appropriate, the section must be one that "may be violated if the permit were granted" (415 ILCS 5/39(a)(2)). We fail to see how the Agency's authority to condition permits would be violated if the permit were to issue. The Board accordingly finds that denial point #2 is not supported by Section 807.206(a).

Section 39(c) of the Act refers in general to the prerequisite of local siting approval for new regional pollution control facilities prior to the Agency issuing developmental or construction permits. WSREC asserts that the Agency's reliance on it as a basis for denial is without merit because it did submit proof of local siting approval. (WSREC Br. at 25, See Citizens for a Better Environment v. McCook et al. (March 5, 1993), PCB 92-198; Turlek, et

[20] Section 3.17 and 3.27 of the Act are definitions of "industrial process waste" and "pollution control waste", respectively. These sections contain no prohibitions or requirements that could be violated if the permit were issued.

al v. Village of Summit, et al (May 5, 1994), PCB 94-19, 21, 22 aff'd *sub nom*. Turlek v. IPCB, 274 Ill. App. 3d 244, 653 N.E.2d 1288, 210 Ill.Dec. 826 (1st. Dist. 1995).)

The Agency is seemingly concerned that WSREC may receive special wastes in its incoming light industrial wastes in spite of having no local siting approval expressly allowing special wastes. The Agency explains its concern by first noting that WSREC listed in its Waste Characterizations section of its permit application that "light industrial wastes will be accepted at the Facility". (Agency Br. at 31, citing Pet. Exh. 1 at 13.)[21] The Agency next notes that WSREC did not explicitly define the term "light industrial waste" in the application before the Agency, and that the term "light industrial waste" is not otherwise a term of art. The Agency then looked to what it considered the "next closest statutory" definition, which the Agency believes to be "industrial process waste"[22]. Since many "industrial process wastes" are likely to be special wastes, the Agency concludes that, by claiming it will accept light industrial waste, WSREC admits that it will be accepting special waste. In fact in WSREC's application it explicitly states that, "only MSW from residences, and non-hazardous commercial and light industrial wastes, will be accepted at the Facility". (Pet. Exh. 1 at 13.)

WSREC protests the Agency's reasoning. Among other matters, WSREC claims that if the Agency wished to parse definitions, it should have looked to the definition of "municipal refuse" instead of "industrial process waste". WSREC contends that it repeatedly asserted that its proposal is for a MSW facility, not a special waste facility. (WSREC Br. at 26.) WSREC emphasizes that its application to the Agency identifies numerous unacceptable wastes, including "numerous examples of special wastes, as well as a catch-all phrase which mirrors requirements of the Act's definitions of industrial process and pollution control wastes". (WSREC Reply. at 15-16.) Finally, WSREC notes that the transfer station was only permitted to accept MSW and barred from accepting special wastes. (WSREC Reply. at 15.)

We agree with WSREC. We find the Agency's definitional analysis torturous. We further find no justification for the Agency's failure to take at face value WSREC's assertions that it intends to accept neither special wastes nor to operate a special waste facility. The Board accordingly rejects denial point #2 as an acceptable basis for denying WSREC's permit application.

As we noted in our conclusion regarding denial point #1, *supra*, compliance with a permit is never a defense against violation of the Act or of a regulation promulgated pursuant to the Act. (Landfill, Inc. *supra* at 265.) Accordingly, we emphasize that rejection of the Agency's denial point #2 does not constitute license for WSREC to violate regulations

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[21] Mr. Harmon testified that he was concerned over receipt of light industrial waste which might include processed waste, because industrial processed waste is special waste by definition. (Tr. 50-51.)

[22] The Agency claims that it is reasonable not look to "municipal refuse" or "waste" because the extent to which municipal waste refers to industrial waste is "industrial lunchroom or office waste". (Agency Br. at 32.)

governing the management and disposal of special waste. Violation of such regulations remain subject to full enforcement.

Land Denial Points #3 and #4: Emergency Coordination Agreements and Training

Denial points #3 and #4 are similar to each other in that the Agency cites the same sections of the Board's regulations as support for the denial reasons, and WSREC raises similar arguments for rejection of the denial reasons. Because of these similarities, we will address these denial points together.

The denial points are, respectively:

Denial Point #3:

> The permittee failed to describe the emergency coordination agreements with local police and fire departments, hospitals, contractors, and state and local emergency response teams to familiarize them with the facility and actions needed in case of emergency. Copies of agreements to enter into coordination agreements were not provided.

Denial Point #4:

> The permittee failed to provide an outline of both the introductory and continuing training programs to prepare personnel for their required job tasks.

The Agency asserts that the legal bases for denial points #3 and #4 are 35 Ill. Adm. Code 807.206(a), 807.314(d), and 807.314(g). (Tr. 54, 62; Agency Br. at 32-34). That is, the Agency contends that these sections of the Board's regulations would be violated if the permit were to issue. We have already addressed the inadequacy of Section 807.206(a) as support for denial reasons (see denial point #2, *supra*), and will not repeat it here.

35 Ill. Adm. Code 807.314(d) and (g) are found in the Board's regulations governing sanitary landfills found at 807.Subpart C:

> Subpart C: Sanitary Landfills
>
> * * *
>
> Except as otherwise authorized in writing by the Agency, no person shall cause or allow the development or operation of a sanitary landfill which does not provide:
>
> * * *
>
> d) Adequate measures for fire protection as approved by the Agency;
>
> * * *

g) An operational safety program approved by the Agency;

35 Ill. Adm. Code 807.314(d) and (g).

WSREC argues that Sections 807.314(d) and (g) apply only to sanitary landfills, and not to resource recovery facilities. WSREC's reasoning is that both provisions occur within a portion of the regulations expressly titled "Sanitary Landfills". Moreover, Section 807.314 itself explicitly references only sanitary landfills. Because WSREC's proposed facility is not a sanitary landfill, WSREC contends that these sections do not provide justification for denial points #3 and #4. (WSREC Br. at 28-30.)

The Agency replies that, "[w]hile Subpart C of Part 807 is captioned as addressing operation of a sanitary landfill, Petitioner is incorrect in its statement that sections within Subpart C should not be applied to solid waste treatment facilities such as the resource recovery facility proposed". (Agency Br. at 33; Tr. 54, 232-233.) The Agency further claims that Section "807.301 prohibits the operation of a sanitary landfill unless in compliance with each requirement of Subpart C, but does not on its face limit the application of Subpart C *only* to sanitary landfills. Indeed, Part 807 is intended to govern the permitting of solid waste management facilities". (Agency Br. at 33.)

We agree with the Agency that Part 807 "is intended to govern the permitting of solid waste management facilities". However, we reject the Agency's contention that thereby all provisions of Part 807 apply to every kind of solid waste management facility. Subpart C (and accordingly Section 807.314) applies explicitly only to sanitary landfills.

We also reject the Agency's request that the Board today, "fill a gap in the permitting scheme" by ruling that Part C hereafter be applicable to solid waste facilities generally. (Agency Br. at 34.) The Agency implies that the Board in a previous quasi-adjudicative case (Waste Management, Inc. v. IEPA (October 1, 1984) PCB 84-45, 84-61, 84-68, aff'd sub nom. IEPA v. IPCB, 115 Ill. 2d 65, quoted supra, p.10) applied Part 807 "arguably outside of what is explicitly provided for in the body of regulations". (Agency Br. at 33). The Board not only finds that this characterization of Waste Management is incorrect, but also finds that there is nothing in our Waste Management decision that stands for the proposition that the Board may change the scope of rules in quasi-adjudicatory cases.

The Board has no authority to change regulations other than via the rulemaking authorities explicitly granted it under Title VII of the Act. As the Agency well knows, rulemaking authority does not exist in a permit appeal case, such as the instant case. If the Agency truly believes there is a gap in the permitting process, it may propose regulations to the Board to rectify the matter.

For these reasons, we find that denial points #3 and #4, as cited in the Agency land permit denial letter of February 27, 1997 are not supported by the record.

Land Denial Points #5 and #6: Ownership

Denial points #5 and #6 are similar in that they both deal with issues of ownership and the Agency cites the same sections of the Board's regulations as support for the denial points. Because of these similarities, we will address these denial points together.

The denial points are, respectively:

Denial Point #5:

> The LPC-PA1 (General Application for Permit) was not signed by each current land owner.

Denial Point #6:

> The application did not contain any documentation which indicated that West Suburban Recycling and Energy Center, Inc. had authority to apply for a permit on behalf of the current land owners.

At hearing the Agency identified 35 Ill. Adm. Code 807.205(d) as the regulatory provision that would be violated if the permit were granted in spite of denial points #5 and #6. 35 Ill. Adm. Code 807.205(d) provides that:

> All permit applications shall be signed by the owner and operator of the waste management site or their duly authorized agents, shall be accompanied by evidence of authority to sign the application and shall be certified as to all engineering features by a professional engineer.

"Owner" is defined in the Board's regulations at 35 Ill. Adm. Code 807.104:

> "Owner" means a person who has an interest, directly or indirectly, in land, including a leasehold interest, on which a person conducts a waste treatment, waste storage or waste disposal operation. The "owner" is the "operator" if there is no other person who is conducting a waste treatment, waste storage or waste disposal operation.

WSREC proposes to build the facility on property located in the Villages of Summit and McCook. Storage activity would take place on the McCook 19-acre portion of the site. (WSREC Br. at 35.) WSREC held an option to purchase the 19 acres of land in McCook, and all but four parcels in Summit, from an interestholder named MPL, Inc. (*Id*.) According to WSREC, the Village of Summit would use its "quick-take" authority to acquire the remaining four parcels of the Summit property.

WSREC contends that it supplied the necessary information on forms provided to it by the Agency. WSREC notes that the LPC-PA1 form, or General Application for Permit form, contains four lines where the applicant must list the owner and operator of the proposed site. WSREC's permit application contained this form (Pet. Exh. 1 at 27, 52), and lists West Suburban Recycling Energy Center, Inc., along with the WSREC address, at the appropriate place. (*Id*.)

WSREC further contends that "WSREC, Inc., the general and managing partner of WSREC, L.P. was the only party required to sign WSREC's land application under the Board's rules" (WSREC Reply at 19) because it was the only proposed operator of the site and qualified as the owner (WSREC Br. at 36). WSREC states that it held "direct or indirect interests" in the site property. It points out that the Agency had previously granted WSREC a supplemental permit to modify the development of the transfer station and explicitly stated that the permit was granted to "West Suburban Recycling and Energy, Inc., as owner and operator". (Pet. Exh. 1 at 156.)

Lastly, WSREC claims that it has sufficient ownership to satisfy 807.205(d), because the storage activity will take place exclusively on the 19 acres of the McCook portion of the Site, and the Act does not require WSREC to secure a solid waste management development permit for other than solid waste management activities. (WSREC Reply at 21.) WSREC argues that the "only portion of the WSREC operation to which the land permit application properly applies is the storage of waste before incineration" (WSREC Br. at 35, citing Tr. 190-91) and WSREC has already obtained an option to purchase those 19 acres from interestholder, MPL, Inc. (Tr. 1994; Pet. Exh. 1 at 32.)

At hearing Mr. Harmon of the Agency testified that he believed the Agency's position was that such an option might be ownership interest sufficient for compliance with 807.205(d). (Tr. 66.)

Even if the BOL considered the portions of the Site beyond the proposed 19 acres of storage, WSREC claims it "owned" this property as well. (WSREC Br. at 35-39.) All but four parcels of the Summit property were covered by the MPL option contract. And with regards to those four remaining parcels, WSREC claims it was involved in on-going negotiations with the owners of that property. WSREC's application explained its ownership status as:

> The Applicant has entered into an option agreement with MPL Incorporated to purchase a 28-acre parcel of property owned by MPL Inc. which is part of the 36-acre Site. The Site includes four (4) other parcels of property which will be purchased from the current owners or acquired through the quick-take authority of the Village of Summit.
>
> Pet. Exh. 1 at 32.

The Agency disagrees by arguing that WSREC held "no interest in the property and made no demonstration that it was authorized to sign on behalf of those who did". (Agency Br. at 41.) According to the Agency, all of the owners of the 36-acre site must sign the permit application, and therefore WSREC's lone signature is insufficient to meet the requirement of Section 807.205(d). (Agency Br. at 35-41.)

Regarding WSREC's option contract, the Agency claims that WSREC has neither an ownership interest in the MPL's property nor a binding contract for its sale, because WSREC has yet to exercise the option. (Agency Br. at 37.) In the same manner it argues, the Village of Summit does not have an ownership interest in the four other parcels until it exercises its "quick-take" authority, which it has never done before, and which the Agency anticipates will be a lengthy process. (Agency Br. at 38.)

Additionally the Agency states that WSREC failed to put into the permit application that it was authorized to sign the application on behalf of the owners of the 4 parcels, although WSREC asserts that it was authorized to do so for those owners and the Village of Summit on the basis of an agency relationship. (Agency Br. at 38-41.) The Agency argues that there is no agency relationship between any of the parties because it is the conduct and words of the apparent principal, not the apparent agent, which creates an apparent agency. There is no evidence in the application that the Village of Summit, or the four landowners said or did anything which would suggest an agency relationship with WSREC. Lastly the Agency claims that it is not only the McCook portion of the site but also the Summit portion which is affected in this denial point because "(o)nce, however, a portion of a facility becomes subject to regulation, it is the entire facility and not just that portion that is covered by the permit". (Agency Br. at 36, Ftn. 28.)

The issue for the Board is whether WSREC's application satisfied the requirements under Section 807.205(d). WSREC is appealing the Agency's denial of its application for a solid waste management development permit. A development permit is required for "any new solid waste management site". (35 Ill. Adm. Code 807.201, 415 ILCS 5/21 (1994).)

Accordingly WSREC must fulfill the requirements of Section 807.205(d) for the entire site. Where "site" is defined broadly in the Act as: "any location, place, tract of land, and facilities, including but not limited to buildings, and improvements used for purposes subject to regulation or control by this Act or regulations thereunder". (415 ILCS 5/3.43 (1994.) The Board's regulations define "site" as "any location, place, or tract of land used for waste management. A site may include one or more units". (35 Ill. Adm. Code 807.205(d)).

Other pertinent definitions found in the Board's regulations at 35 Ill. Adm. Code 807.104 are:

> "Waste management" means the process of storage, treatment or disposal of waste, not including hauling or transport.
>
> "Unit" means any device, mechanism, equipment or area used for storage, treatment or disposal of waste.

WSREC's site encompasses the entire 36 acres, and therefore a developmental permit is required for all of those acres.[23]

Now the issue becomes whether WSREC met the requirements in 807.205(d) with respect to the entire 36 acres. The Board finds that WSREC provided the Agency with sufficient information to comply with Section 807.205(d). (35 Ill. Adm. Code 807.205(d).)

WSREC explained in its application that it entered into an option agreement with MPL Incorporated to purchase a 28-acre parcel of property owned by MPL Inc. (Pet. Exh. 1 at 32.) If the Agency wanted to see proof of these contracts, it should have requested them. WSREC also explained that the remaining four parcels in McCook would either be purchased from the current owners or the Village of Summit would acquire the parcels through its "quick-take" authority.

The Board agrees that WSREC should have included as much documentation as it had in its possession when the application was submitted. However, WSREC did include an explanation of the site's ownership status in its application. Testimony from the Agency shows that in the past the Agency's position was that such option contracts may be ownership interest sufficient for compliance with 807.205(d). (Tr. 66.)

The Board finds that WSREC was the only signatory necessary for the permit application. It would be an unreasonable restraint on commerce to require all interestholders in the property to sign the permit applications. Therefore the general and managing partner of WSREC, L.P.'s signature alone is sufficient to meet the requirement of Section 807.205(d).

Land Denial Point #7: Alleged Consequences of Pre-Contamination

The seventh reason given by the Agency for denying the land permit is:

> West Suburban Recycling and Energy Center, Inc. failed to document that on-site contamination left in place would not cause a violation of Sections 12(a), 21(a), 21(d) or 21(e) of the Illinois Environmental Protection Act.

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[23] See also the Board's broad definition of "facility" in County of Kane, et. al. v. IEPA (February 1, 1996) PCB 96-85.

Denial point #7 focuses on the alleged existing contamination at the WSREC site. The site does indeed contain at least two former landfills and some underground storage tanks. (Tr. 143.) It is uncontested that these features date from times prior to ownership of the site by WSREC. The Agency admits it learned of the contamination primarily as the result of negotiations between WSREC and the Agency under the aegis of a voluntary clean up program. (Tr. 82.)

WSREC contends that denial point #7 is invalid because, on its face, it is a requirement that WSREC clean up the alleged contamination as a condition of receiving the requested land permit. WSREC claims that "the Agency has no authority to deny WSREC a permit based on alleged pre-existing contamination" (WSREC Reply at 23), and that by so doing the Agency is acting beyond the scope of its authority and attempting to expand its permitting authority beyond that allowed by the Act (WSREC Br. at 39-43). Mr. Harmon, one of the Agency permit reviewers, testified at hearing that he did not know of any other instances where permits were denied due to site contamination. (Tr. 72.)

WSREC argues that there is no Board regulation or provision in the Act requiring an applicant for a solid waste management development permit, or any other non-RCRA permit, to remediate possible pre-existing contamination at the proposed site. WSREC contends that authority for dealing with sites possibly impacted by contamination lies outside the permitting process[24], and is properly addressed in programs such as brownfields, the pre-notice program, LUST, RCRA, and Section 4 of the Act. (WSREC Br. at 40.)

The Agency answers that it is not the continuing presence of contamination that is the basis for denial point #7. (Agency Br. at 41.) The Agency instead explains that WSREC did not go into sufficient detail about how it would conduct excavation, grade, or conduct other construction activities without impacting the existing contamination, or how it would manage the construction if contamination was encountered. (*Id*. at 43-44.) The Agency notes "there is nothing in the application that describes the nature and extent of the existing contamination". (*Id*. at 44.) The Agency gives Section 39(a) as the statutory support for this explanation (*Id*. at 41), rather than the sections of the Act actually cited[25] in denial point #7.

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[24] The Board notes that it is well-settled that the Agency cannot attempt to enforce against an alleged violator through the permitting process. (See, e.g., Centralia Env. Services v. IEPA (October 25, 1990) PCB 89-170, 115 PCB; ESG Watts v. IEPA (October 29, 1992) PCB 92-54, 137 PCB 47.)

[25] Section 39(a) of the Act deals generally with procedures for the issuance of permits. The sections of the Act cited in denial point #7 consist of a prohibition against causing, threatening, or allowing the discharge of any contaminants into the environment (Section 12(a)); causing or allowing open dumping (Section 21(a)); conducting a waste-storage, waste-treatment, or waste-disposal operation with a permit or in violation of regulations (Section 21(d)); and handling of waste at a facility other than as provided in the Act and regulations (Section 21(e)).

The Agency has the responsibility of accurately, clearly, and completely stating in the denial letter the basis for each denial point. Moreover, the Agency may not, after the issuance of the denial letter, change or expand any denial reason. (Grigoleit Co. v. IEPA (November 29, 1991) PCB 89-184.) We find here that the only reason the Agency gives to this Board in support of denial point #7 is not the same as is actually written in denial point #7, and accordingly constitutes impermissible augmentation of the denial point by the Agency. The fact is that this Agency explanation does not comport with the plain reading of denial point #7. It comports neither with the plain reading, that it is contamination left in place that would be the cause of violations, nor with the Agency's explanation at hearing that the violations would be of Sections 12(a), 21(a), 21(d) or 21(e) of the Act. We therefore reject the Agency's explanation as justification for denial point #7.

We agree with WSREC that there is no apparent authority for the Agency to require cleanup of a contaminated site as a precondition to the granting of a construction permit for that site. We certainly know of no such authority, and the Agency makes no attempt to apprise us of such authority.

For these reasons we find that the record does not support denial point #7. The Board emphasizes that rejection of the Agency's denial point #7 does not constitute license for WSREC to develop, construct, or operate a facility in such a way as to contribute or aggravate pollution which exists at the site or cause any new pollution. Such activity would still be illegal and subject to enforcement. Compliance with a permit is never defense against violation of the Act or of a regulation promulgated pursuant to the Act. (Landfill, Inc. *supra* at 265; Grigoleit 613 N.E.2d at 349.)

Land Denial Point #8: Floodproofing

The eighth point cited by the Agency as basis for denial of the land permit application is:

> The applicant failed to provide design drawings and calculations from a structural or civil engineer which verify that the proposed design of the facility will withstand a flood.

The Agency has identified 35 Ill. Adm. Code 807.206(a), 807.206(b), and 807.207 as the provisions of the Board's regulations that would be violated if the permit were to issue. (Tr. 385-386[26].) For the first time in its brief, the Agency also contends that Section 39.2(a) of the Act would be violated if the permit were to issue. (Agency Br. at 44.)

[26] The Board has addressed *supra* the Agency's failure to include the required Section 39(a) information in the denial letter itself, and will not repeat the analysis here.

We note that introducing Section 39.2(a) for the first time in its post-hearing brief is not proper, and accordingly we cannot consider any argument on denial point #8 based on 39.2(a). We note additionally that Section 39.2(a) is a provision of the Act that specifies the conditions under which a local siting authority must grant siting approval. Section 39.2(a) does not give the Agency authority to require compliance with any of the nine criteria contained therein. Only the local siting authority is vested with making decisions regarding the nine criteria. The Agency may not usurp that authority.

There are also difficulties with the Agency's reliance on the cited sections of 35 Ill. Adm. Code. Section 807.206 entitled "Permit Conditions". As we have found above (see denial points #2, *supra*), subsection 807.206(a), which grants authority to the Agency to condition permits, is an inappropriate basis of support for a permit denial. We similarly find that subsection 807.206(b) is inappropriate. Section 807.206(b) provides that an applicant may deem any condition imposed by the Agency as a denial for the purpose of appeal[27]. We fail to see how WSREC's right to appeal permit conditions would be violated if the WSREC permit were to issue.

The third provision identified by the Agency as a regulation that would be violated were the permit to issue, 35 Ill. Adm. Code 807.207, occurs in the Board's regulations under the caption "Standards for Issuance". In pertinent part, Section 807.207 provides:

> The Agency shall not grant any permit, except an Experimental Permit under Section 807.203 unless the applicant submits adequate proof that the solid waste management site:
>
> a) will be developed, modified, or operated so as not to cause a violation of the Act or the Rules, or has been granted a variance pursuant to Title IX of the Act; and
>
> b) conforms to the design criteria promulgated by the Agency under Section 807.213, or conforms to such other criteria which the applicant demonstrates will achieve consistently satisfactory results; and
>
> * * *
>
> 35 Ill. Adm. Code 807.207 (1994).

While Section 807.207 clearly specifies an Agency authority to deny a permit, and it is a section which likewise clearly would be violated if the applicant failed to provide the proofs

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[27] 35 Ill. Adm. Code 807.206(b) provides, in its entirety: "The applicant may deem any condition imposed by the Agency as denial of the permit for purposes of review pursuant to Section 40 of the Act". Section 40 of the Act delineates procedures and authorities for permit reviews before the Board.

specified in (a) and (b), we nonetheless question where Section 807.207 provides sufficient specificity to comply with Section 39(a). Section 807.207 consists of a very general prohibition on the Agency's authority, whereas Section 39(a) calls for "detailed statements" in the denial letter sufficient to allow the applicant to understand the reasons for the denial. (415 ILCS 5/39(a); see also our analysis *supra*.) We find it unacceptable to accept that citation to Section 807.207 is sufficient for WSREC to know how the Agency judged the application to be insufficient with respect to flood information, and properly prepare a defense.

Assuming arguendo that citation to Section 807.207 is adequate to meet the Agency's Section 39(a) obligations, we are still compelled to find that denial point #8 is not supported in the record.

The Agency contends in denial point #8 that WSREC did not provide information sufficient to satisfy the nebulous requirement that the facility will "withstand a flood" (Pet. Exh. 8, February 27, 1995 denial letter.) There is no requirement in the Board's regulations nor in the Act that we can identify that uses the phrase "withstand a flood".

Where the regulations do speak to protection from floods, the most rigid standard is protection against damage from the 100-year flood event, either by placement outside the 100-year floodplain or by flood-proofing against the 100-year flood. Such a standard applies to new solid waste landfills. (35 Ill. Adm. Code 811.102(b).) It does not apply to MWC facilities, such as proposed by WSREC. Nevertheless, the record supports that WSREC's proposed facility does meet even this 100-year flood event standard.

Maps submitted by WSREC indicate that the nominal finished floor elevation of the proposed building is 603 feet National Geodetic Vertical Datum (NGVD), and the 100-year floodplain elevation is 601 feet NGVD. (Pet. Exh. 2 at 5, Proposed Floodplain Delineation Plan.) Thus, all the waste on site will be located at a minimum of two feet above the 100-year floodplain elevation. Standard engineering practice is that the flood protection elevation is considered as the elevation of the base flood (e.g., 100-year flood) plus one foot of free board at any given location in the floodplain. Here, that standard is met.

Thus WSREC's design complies fully with the most stringent flood protection standards applicable to any type of MSW management facility in Illinois.

We accordingly reject denial point #8 as an acceptable basis for denying WSREC's permit application.

Conclusion

Based on the above, the Board finds that WSREC has met its burden of proof that operating under the land permit as requested would not violate the Act or Board regulations. The Board will accordingly reverse the Agency's denial of the land permit application and remand this matter to the Agency with instructions that the permit issue.

AIR PERMIT DENIAL

The Agency has cited four[28] reasons for denial of the WSREC air permit application. (Pet. Exh. 8, February 27, 1995 denial letter.) The full text of the denial reasons is as follows:

> The Agency has reviewed your Application for Construction Permit for the above referenced project. The permit application is DENIED because Section 9 and 9.4 of the Illinois Environmental Protection Act, and 35 Ill. Adm. Code 201.152 and 203.302(a)(1)(D) may not be met.
>
> 1. 35 Ill. Adm. Code 201.152 specifies the minimum data and information to be contained in a construction permit application. As your permit application did not contain this information the Agency could not determine compliance with the Act and Regulations.
>
> a. As this facility is located in a severe ozone non-attainment area and will have annual nitrogen oxide emissions greater than 25 tons/yr, the facility is subject to the provisions of 35 Ill. Adm. Code Part 203, Subpart C.
>
> (1) The information supplied does not support that the Lowest Achievable Emission Rate (LAER) has been proposed for nitrogen oxide emission reduction. The application has not provided sufficient reasons for elimination of the higher efficiency Selective Catalytic Reduction (SCR) technology.
>
> (2) 35 Ill. Adm. Code 203.302(a)(1)(D) requires 1.3 to 1 nitrogen oxides emission off-set for new emissions. The application does not contain sufficient information to show that the necessary emissions

[28] The four denial points are provided in the Agency's denial letter in outline form. The Board follows herein the convention established in the denial letter, such that the four denial points are denominated respectively as 1.a(1), 1.a(2), 1.b(1), and 1.b(2).

offsets will be available when the proposed municipal waste combustors go into operation. In particular, additional information is needed to document specific emission units from which such offsets may be provided, the methods or technologies by which such offsets might be obtained and why such emission decreases are not otherwise required by the federal Clean Air Act.

b. Section 9.4 of the Environmental Protection Act requires the Best Available Control Technology (BACT) for municipal waste combustors

(1) The application has proposed duct injection of activated-carbon to reduce emissions of dioxin/furans and mercury. Other carbon adsorption technologies such as fixed bed and fludized bed which may be more effective have not been adequately evaluated in the BACT demonstration submitted.

(2) The emission tests submitted from similar municipal waste combustors show level of dioxin/furan emissions below the proposed New Source Performance Standard (NSPS) 40 CFR 60 Subpart Eb. The application does not adequately address why, based on these tests, BACT should not be set at a level below the proposed NSPS.

Air Denial Point 1.a(1): LAER for NO_x Emissions

The Agency denial point 1.a(1) is premised on WSREC's proposed facility being located in a severe ozone nonattainment area, which in turns triggers various ozone control requirements. Because the air application indicates that the facility would emit more than 25 tons per year of nitrogen oxides (NO_x), the facility is subject to the requirements for major new sources, or the New Source Review (NSR) of 35 Ill. Adm. Code 203. In pertinent part, Part 203 requires that the applicant demonstrate that the facility will meet the Lowest Achievable Emission Rate (LAER)[29] for emissions of NO_x, and have offsets from existing

[29] LAER is a technical term-of-art defined in the Board's regulations in pertinent part at 35 Ill. Adm. Code 203.301:

Section 203.301 Lowest Achievable Emission Rate

a) For any source, lowest achievable emission rate (LAER) will be the more stringent rate of emissions based on the following:

sources of 1.3 tons for every ton of NO_x emitted. (35 Ill. Adm. Code 203 (1994).) WSREC does not dispute that the LAER provision of Part 203 applies to its proposed facility.

The Agency denied WSREC's air application based on LAER concerns with the statement:

> (1) The information supplied does not support that the Lowest Achievable Emission Rate (LAER) has been proposed for nitrogen oxide emission reduction. The application has not provided sufficient reasons for

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> 1) The most stringent emission limitation which is contained in the implementation plan of any state for such class or category of stationary source, unless it is demonstrated that such limitation is not achievable; or
>
> 2) The most stringent emission limitation which is achieved in practice by such a class or category of stationary source. This limitation, when applied to a modification, means the lowest achievable emissions rate for the new or modified emissions units within the stationary source. In no event shall the application of this term permit a proposed new or modified stationary source to emit any pollutant in excess of the amount allowable under an applicable new source performance standard adopted by U.S. Environmental Protection Agency pursuant to Section 111 of the Clean Air Act and made applicable in Illinois pursuant to Section 9.1 of the Act.
>
> b) The owner or operator of a new major stationary source shall demonstrate that the control equipment and process measures applied to the source will produce LAER.
>
> * * *
>
> d) The owner or operator shall provide a detailed showing that the proposed emission limitations constitute LAER. Such demonstration shall include:
>
> 1) A description of the manner in which the proposed emission limitation was selected, including a detailed listing of information resources,
>
> 2) Alternative emission limitations, and
>
> 3) Such other reasonable information as the Agency may request as necessary to determine whether the proposed emission limitation is LAER.

elimination of the higher efficiency Selective Catalytic Reduction (SCR) technology.

WSREC's air application proposed the use of Selective Non-Catalytic Reduction (SNCR) technology to control, and achieve LAER, for NO_x emissions. The Agency contends that WSREC did not sufficiently evaluate Selective Catalytic Reduction (SCR) technology, which is clearly more efficient in NO_x removal than SNCR technology. Hence, the Agency argues that WSREC failed to make the demonstration required by the Board regulations at 35 Ill. Adm. Code 203.301.

WSREC acknowledges that, based on its proposed NO_x emissions at the time of the application, its facility qualified as a major stationery source for NO_x. (WSREC Br. at 55, citing Pet. Exh. 14 at 217-218.)[30] According to WSREC, its proposal to control NO_x emissions with good combustion practices and SNCR post-combustion technology constituted LAER. (WSREC Br. at 55-56, Pet. Exh. 14 at 290.)

WSREC states that it included in its application all the required information pursuant to 35 ILCS 203.301(d)[31]. On several occasions the Agency requested additional information not contained in the original air application, which WSREC accordingly submitted. WSREC in its original air application, dated June 30, 1994, proposed SNCR as LAER. (Pet. Exh. 12 at 240-241.) On August 3, 1994, the Agency issued a Notice of Incompleteness to WSREC. One of the items listed in the Notice of Incompleteness stated that WSREC had not included a review of all NO_x control technologies, including SCR, in proposing LAER for NO_x. (Pet. Exh. 19 at 2.) In response to the Notice of Incompleteness, WSREC amended its application on September 30, 1994. (Pet. Ex 14.) In its amended application, WSREC provided more discussion of SCR and SNCR and concluded that SNCR technology is LAER. (*Id*.) Subsequent to receiving the permit denial letter, WSREC submitted additional information concerning the LAER determination to address the deficiencies identified in the Agency's denial letter. (Pet. Exh. 17 at 11.)

With regards to meeting the requirements in 203.301(a)(1), WSREC claims that "the NO_x emission limitation proposed by WSREC, 100 ppm, is more stringent than the limitation

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[30] WSREC argues that pursuant to the USEPA January 26, 1996 grant of Petition 182(f) for exemption from NSR requirements for NO_x effective February 26, 1996, the Agency's 1.a.(1) and 1.a.(2) denial points are no longer applicable. (WSREC Br. at 55, Ftn. 28, Agency Br. at 47, Ftn. 35.) However, the Board notes that this was only a waiver from the federal requirements and does not moot the Agency's denial reasons based upon state regulations. Indeed, the Agency acted responsibly in not assuming that the federal petition would be granted. This argument is not properly before the Board at this time.

[31] SNCR technology is employed at several MWC facilities in the United States and the USEPA has identified SNCR technology as the maximum achievable control technology (MACT) for controlling the emissions of NO_x.

for an MWC in any SIP". (WSREC Br. at 57, citing Pet. Exh. 14 at 290; Tr. 1137, 1675.) The Agency does not appear to dispute WSREC's assertion that its proposed NO_x limitation of 100 ppm is lower than any limit in a SIP. Thus, WSREC believes that the only possible issue remaining is Section 203.301(a)(2), whether the proposed NO_x limitation is more stringent than the most stringent limitation achieved in practice by a MWC. The Board agrees, there does not seem to be a debate as to whether WSREC's proposal satisfied 203.301(a)(1). Therefore the Board must examine what emission limitation is achieved in practice pursuant to 203.301(a)(2).

Regarding Section 203.301(a)(2), WSREC claims that this emission limitation of 100 ppm for NO_x was "more stringent than the most stringent limitation achieved in practice" and that the Agency is wrong in believing that SCR technology is necessary to attain LAER. (WSREC Br. at 57-58.)[32] WSREC argues that transferring SCR to MWC's is technically infeasible. In this regard it listed the difficulties associated with applying SCR to MWCs, including technical difficulties, extremely high demonstrated cost, and the fact that no other MWC in the United States uses SCR, as signs that SCR has not been achieved in practice. (*Id*.)

WSREC states that in order to overcome the serious concerns, the conventional SCR technology must be "re-engineered". According to WSREC, re-engineering involves: the placement of the SCR system downstream of the air pollution control devices; the addition of a re-heat system to raise the flue gas temperature; and the use of additional activated carbon polishing filter prior to the SCR to further clean the flue gas and extend the catalyst life. (WSREC Br. at 59.) WSREC states that there is simply no data to show that these re-engineered systems will provide superior performance over the long-term, and rather WSREC claims transferring SCR to MWCs would cause an immediate reduction in the efficiency of the system. (WSREC Br. at 58.)

WSREC presented an estimate of the magnitude of the cost of applying SCR technology at its facility based on an estimate prepared for a proposed MWC facility in Mercer County, New Jersey. WSREC states that cost of applying "cold-side" (re-engineered) SCR technology without a carbon filter would be $15 per ton of MSW and with carbon filter would be $17.80 per ton of MSW. Further, WSREC asserts that the added costs would necessitate an increase in tipping fees in the range of 30 to 35 percent. (Pet. Exh. 14 at 54-56.) Based on the impact of applying SCR on tipping fees, WSREC contends that application of SCR technology should not be considered LAER for MWCs. WSREC asserts that the high costs associated with SCR technology prohibit the application of SCR to the MWC industry in the current United States marketplace and therefore SCR is not economically available.

[32] WSREC makes the argument that the Agency incorrectly bases its decision on emission rates achieved in practice, and the Agency should be looking at the most stringent emission limitation achieved in practice. (WSREC Reply at 29.)

WSREC maintains that its position is consistent with the USEPA's draft policy on nonattainment area requirements, which sets forth that a technology should not serve as the basis for establishing LAER, if the cost of maintaining the associated level of control is so great that no new plants could be built in a particular industry.

However the Agency alleges that WSREC did not provide a detailed showing that the proposed emission limitations will constitute LAER as required pursuant to Section 203.301(d). (Agency Br. at 48.) The Agency emphasizes that it does not, and did not, state that SCR was LAER, but "the information in the Air Application was insufficient to eliminate SCR as LAER". (Agency Br. at 52.)

The Agency states that the SCR technology is available for application to MSW incinerators[33]. It points out that WSREC's own exhibits show technologies employed outside the United States, specifically SCR technology, is in use in MSW incinerators in Japan and Europe to control NO_x, where it has achieved NO_x removal efficiency between 70 to 80 percent as compared to 50 to 70 percent reductions achieved by using SNCR. (Pet. Exh. 14 at 285.) In view of this, the Agency contends that it was incumbent on WSREC to demonstrate that SCR technology was not required as LAER for the project, and such a demonstration was not made by WSREC. (Agency Br. At 49.)

In fact, WSREC's own exhibit, Pet. Exh. 40, Memo from John Reed to Jim Cobb, Harish Desai, Hank Naour, and Chris Romaine dated December 19, 1994, shows that early on in the application process the Agency was having difficulty with their initial determinations upon which WSREC relies; as evidenced in Mr. Cobb's memo:

> Although the decision was made not to require SCR at this facility, the recent information given as part of the CGE-Ford Heights facility (attached) certainly calls that decision into question. None of this information was adequately addressed by the permit applicant and no one has inquired of the true status of SCR from the vendor with actual experience, i.e. Mitsubishi Heavy Industries. I believe our decision has been made on inadequate and incomplete information and should be reviewed and revised to take into account the true status of SCR for municipal solid waste combustion.

The Agency disputes WSREC's contention that applying SCR to MSW incinerators in the United States would require re-engineering. The Agency argues it is not re-engineering at all, but rather only minor adjustments to the SCR system. (Agency Br. at 50.) Next, the Agency points out the WSREC's air application did not include technical data or analysis

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[33] The Agency relies on the definition of "available" found in the section discussing BACT. (Agency Br. at 49, Ftn. 37.)

demonstrating that applying SCR to MSW incinerators would be technically infeasible. (Agency Br. at 51.)[34]

Finally, the Agency states that the air application did not demonstrate that the SCR technology is economically infeasible. WSREC had argued that the cost of the SCR application to the MSW incineration industry is prohibitive in the current United States marketplace. (Pet. Exh. 16 at 51.) In this regard, the Agency states that the NSR manual clearly provides that an emissions limitation should not be considered as LAER, or achievable, only if the costs of maintaining the associated level of control are so great that no new plants could be built in that industry due to economic impacts accompanying a particular control technology. The Agency believes that this demonstration of economic infeasibleness must be industry wide, and not merely limited to a particular source. (Agency Br. at 52.) In this regard, the Agency states that the cost estimates provided in the air application did not address the impact of SCR on the MSW incineration industry in the United States The cost estimates were only used to predict the impact of SCR on tipping fees for the project in Northeastern Illinois. (Pet. Exh. 16 at 51-52.)

The issue of contention in this proceeding concerns Section 203.301(a)(2) that sets forth that LAER must be based on the most stringent emission limitation which is achieved in practice by class or category of stationary source; which in the present context happens to be MWCs. The record indicates that it is possible to achieve a more stringent emission rate by using SCR technology instead of SNCR technology. In fact other MSW incinerators using SCR technology have achieved NO_x removal of 70 to 80 percent, as compared to 50 to 70 percent using SNCR. However, before selecting a technology to achieve the most stringent emission rate, it must be determined whether the technology is technically feasible and economically reasonable.

Regarding the technical feasibility of SCR, the record indicates that it has been used successfully on MWCs in Europe and Japan. It is also clear from the record that the application of SCR technology in the United States would require certain modifications. The Agency characterizes the modifications as minor adjustments, while WSREC uses the term, "re-engineering". Whatever may be the terminology used to characterize the modifications, it appears that with certain system and operating changes, SCR technology could be applied to control NO_x emissions from MWCs in the United States, specifically at the WSREC facility. WSREC itself explains how it would adapt, albeit with difficulty, its operations to include SCR technology (WSREC Br. at 59). Therefore, it is certainly not technically infeasible.

Next, in order to determine whether SCR technology is "available," we address the issue of whether the application of SCR technology to MWCs is economically reasonable. In

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[34] Regarding the issue of flue gas streams from MSW incinerators in the United States "poisoning" the catalyst used in the SCR system (Tr. 1678-1681, 1685), the Agency notes that the WSREC's application itself points a way to minimize the impact of any such poisoning, including moving the location of the SCR system or using a carbon bed filter before the SCR system as part of a multi-stage flue gas cleaning system. (Agency Br. at 51.)

this regard, both the Agency and WSREC refer to the USEPA's NSR manual, which states that a technology should not be considered LAER if the costs of maintaining the associated level of control are so great that no new plants could be built in that industry due to economic impacts accompanying a particular technology.

The petitioner has estimated the impact of applying SCR on the tipping fees to support its position that SCR is not economically "available" for controlling NO_x emissions from MWCs in the United States as a whole. However, the cost information does not address the impact of applying SCR technology on the MSW incineration industry in the United States other than the impact of SCR on tipping fees. Additionally, WSREC did not provide other economic information such as cost effectiveness or a comparison of tipping fees on a regional and national basis, a comparison to other types of disposal methods, etc., to demonstrate that SCR is not economically available. Therefore, WSREC did not provide sufficient information for the Agency to determine whether SCR is economically reasonable.

Based on the above, the Board finds that WSREC's air application did not contain sufficient information for the Agency to conclude that SNCR was LAER for the proposed facility. Accordingly, the Board upholds the Agency's denial point 1.a(1) of the air application denial letter.

Air Denial Point 1.a(2): NO_x Emission Offsets

Like denial point 1.a(1), denial point 1.a(2) is related to the Agency's concerns regarding the proposed facility's need to comply with the NO_x requirements of 35 Ill. Adm. Code 203:

> (2) 35 Ill. Adm. Code 203.302(a)(1)(D) requires 1.3 to 1 nitrogen oxides emission off-set for new emissions. The application does not contain sufficient information to show that the necessary emissions offsets will be available when the proposed municipal waste combustors go into operation. In particular, additional information is needed to document specific emission units from which such offsets may be provided, the methods or technologies by which such offsets might be obtained and why such emission decreases are not otherwise required by the federal Clean Air Act.

35 Ill. Adm. Code 203.302(a)(1)(D) provides that:

> a) The owner or operator of a new major source or major modification shall provide emission offsets equal to or greater than the allowable emissions from the source or the net increase in emissions from the modification sufficient to allow the Agency to determine that the source or modification will not interfere with reasonable further progress as set forth in Section 173 of the Clean Air Act.

1) For new major sources or major modifications in ozone nonattainment areas the ratio of total emission reductions provided by emission offsets for volatile organic material or nitrogen oxides to total increased emissions of such contaminants shall be at least as follow:

* * *

D) 1.3 to 1 in areas classified as severe

* * *

Initially, WSREC contends that 35 Ill. Adm. Code 203.302(a)(1)(D) does not specify any information requirement, and 35 Ill. Adm. Code 201.152 does not specify information requirements for demonstrating NO_x offsets. (WSREC Br. at 62.) On August 3, 1994 the Agency sent WSREC a Notice of Incompleteness which outlined information which must, "be supplied in order for the application to be considered complete", that list included a request for, "documentation showing that specific offsets have been obtained and can be made effective". (Pet. Exh. 19.) According to WSREC, pursuant to meetings between the parties in August 1994, BOA personnel directed WSREC to submit additional documentation to satisfy the emissions offset requirement and those instructions were to, "enter into an agreement to purchase NO_x offsets and/or provide the Agency with a letter from a supplier of offsets stating that they would be supplied to WSREC if the 182(f) petition was denied". (*Id.*, Tr. 1694.) However at hearing Mr. Romaine, of the Agency, did not recall meeting with WSREC and discussing the NO_x offsets.

WSREC sent a letter to the Agency on October 26, 1994 from Commonwealth Edison (ComEd) confirming that WSREC and ComEd had entered into an agreement on October 13, 1994 whereby ComEd agreed to provide WSREC with NOx offsets for its proposed facility. (Pet. Exh. 26). Additionally, WSREC claims that the Agency was aware of ComEd's offsets through the Agency's September 1993 "Draft Proposal: Design for NO_x Trading System". (Pet. Exh. 124.) On November 3, 1994 the Agency sent another Notice of Incompleteness to WSREC which did not include deficiencies concerning NO_x offsets information. (Pet. Exh. 26.)

WSREC interprets 35 Ill. Adm. Code 203.302(a) as not requiring detailed information on the precise sources of the offsets until the operating state. (WSREC Br. at 62.) Rather, WSREC asserts that the Agency should have applied the USEPA guidance on the showing necessary for NO_x offsets at the construction permit stage, which the application would have satisfied. (WSREC Reply at 35.) In general, WSREC argues that the Agency must adopt procedures if it intends on requiring specific information in addition to the requirement imposed by Board regulation (citing 35 Ill. Adm. Code 201.152) and the absence of such procedures results in the denial of due process, and is grossly unfair to the applicant. (WSREC Reply at 37.)

According to the Agency, WSREC did not demonstrate that it had obtained the necessary credible and surplus NO_x offsets. First, the Agency argues it did not necessarily accept WSREC's submittal on NO_x offsets merely because NO_x offsets were not raised in the second Notice of Incompleteness. (Agency Br. at 61-65.) Specifically, ComEd's letter was not sufficient to show "which units might provide offsets or the means by which offsets might be obtained, show that the offsets were surplus, or give details of its agreement" with WSREC. (Agency Br. at 61.) In fact, according to Mr. Romaine of the Agency, they may not have reviewed ComEd's Letter prior to issuing the second Notice of Incompleteness at all, as it was issued only eight days after the ComEd Letter was received.

In any event, the Agency argues that it is not estopped from raising issues in a permit denial simply because they were not raised in a Notice of Incompleteness. Particularly because there is no requirement that the Agency issue a Notice of Incompleteness rather than a denial, and the Notice of Incompleteness' are separately appealable. (*Id*. at 62.)

Second, the Agency's awareness that ComEd was a potential supplier of NO_x offsets (see Pet. Exh. 124, Draft Proposal Design for NO_x Trading System) is not sufficient to satisfy WSREC's requirement to show offsets under Section 203.303. (Agency Br. at 62-63.) The Agency needed more than historical NO_x emissions data from different plants, it also needed specific information as to creditable and surplus emissions reductions to be provided by ComEd including the units and methods to be used to obtain offsets. The Agency claims that an earlier agreement entered into by WSREC with ComEd could have provided the necessary information, but that agreement was never submitted to the Agency.

Third, the Agency cites to a USEPA policy on NO_x offsets as support because the "USEPA's general policy dictates that offsets must be federally enforceable before a construction permit may be issued'. (Agency Br. at 63, citing Pet. Exh. 97.) Last, the Agency argues that the pendency (and subsequent grant) of the NO_x waiver petition under 182(f) of the Clean Air Act does not excuse compliance with the requirements for NO_x offsets. (Agency Br. at 64.) The NO_x Waiver Petition filed with the USEPA was not approved until February 26, 1996, a year after the denial in this matter. (*Id*.)

After reviewing the record the Board believes that the fact that the second Notice of Incompleteness did not again alert WSREC that the Agency considered the air application incomplete as to the NO_x offsets does not necessarily indicate that portion of the application was satisfied. First, the mere submittal of a one paragraph letter from ComEd is not sufficient to satisfy Section 203.302(a)(1)(D) on the merits. Section 203.302(a)(1)(D) requires that the applicant provide information regarding the offsets, "sufficient to allow the Agency to determine that the source or modification will not interfere with reasonable further progress as set forth in Section 173 of the Clean Air Act". ComEd's letter, sent to the Agency by WSREC, did not provide the Agency with sufficient information to satisfy Section 203.302(a)(1)(D), in fact the letter did not include any specifics regarding the agreement between WSREC and ComEd.

Second, the Agency is under no obligation to notify the applicant of the same deficiency over and over again. Although the Board is bothered by the Agency's omission of the NOx offsets in the second Notice of Incompleteness, WSREC cannot assume that because it submitted the ComEd letter that it satisfied the first Notice of Incompleteness. WSREC relies upon the Board's decision in Jack Pease v. IEPA (July 20, 1995) PCB 95-118, where the Agency requested information from the applicant "if" it was available, and then denied the permit because the information was not submitted. That case is distinguished from the matter at hand. Initially because Pease was requesting a renewal permit, whereas WSREC is applying for its initial developmental permit. The Board concluded in Pease that, "the Agency must carefully consider what it is that it is requesting" and then act accordingly if that information is submitted. In the matter at hand, the Agency's Notice of Incompleteness stated that, "NOx emission offsets of 1.3 to 1 must be obtained prior to issuance of any permit. The application does not include documentation showing that specific offsets have been obtained and can be made effective". (Pet. Exh. 19.) The ComEd letter submitted to the Agency in response to this Notice of Incompleteness clearly does not satisfy that requirement: there is no indication where the specific offsets will originate or what plant; there is no assurance that the offsets will be 1.3 to 1; it refers to the terms of the agreement but fails to tell the Agency what those terms are or simply to include the agreement along with the letter.

After a review of the record, the Board finds that WSREC did not support its burden in its original application, or subsequent submittals for the NOx offsets. As such it did not provide sufficient information to the Agency to satisfy 35 Ill. Adm. Code 203.302(a)(1)(D). Therefore, the Board hereby affirms the Agency's denial point 1.a(2).

Air Denial Point 1.b(1): Dioxin/Furans and Mercury Control Technologies

The Agency's denial point 1.b(1) is premised on the fact that WSREC's MSW facility is proposed to burn more than 25 tons per day of MSW. A facility of this type is subject to Section 9.4 of the Act (415 ILCS 5/9.4 (1994)), including the requirement that the applicant demonstrate the facility will have the Best Available Control Technology (BACT) for the control of emissions of dioxin/furans and mercury. WSREC does not dispute that the BACT provision of Section 9.4 applies to its proposed facility.

> b. Section 9.4 of the Environmental Protection Act requires the Best Available Control Technology (BACT) for municipal waste combustors
>
> (1) The application has proposed duct injection of activated-carbon to reduce emissions of dioxin/furans and mercury. Other carbon adsorption technologies such as fixed bed and fludized bed which may be more effective have not been adequately evaluated in the BACT demonstration submitted.

WSREC considered fixed-bed filters, circulating fluidized bed filters, and duct injection and spray adsorption systems for controlling dioxin/furans and mercury emissions from MSW

combustion. Based on a comparison of performance and cost data for the three technologies, WSREC proposes to install a direct injection method to control dioxin/furans and mercury emissions.

There is no debate between the parties that BACT is to be applied to the facility. WSREC proposes to meet BACT by applying good combustion practices, the burning of refuse derived fuel (RDF) (not mass burn), a spray drier absorber, a fabric filter and stepped emission limits for dioxins and furans of 0.5 nanograms per dry standard cubic meter toxic equivalence (ng/dscm TEQ) for the first 3 years and 0.2 ng/dscm TEQ thereafter. (WSREC Br. at 66 & WSREC Reply at 38.) WSREC initially proposed the installation of an experimental carbon duct injection (CDI) system on a test basis, but rejected the CDI system as BACT due to lack of data showing effectiveness on an RDF MWC and because data showed that no carbon system was needed to meet BACT. (WSREC Reply at 38.)

WSREC denies that it did not address the technologies outlined in the BOA's denial letter. Indeed on November 29, 1994 it submitted additional information specifically on fixed and fluidized bed technology requested by the BOA. (WSREC Br. at 66-67.) WSREC states that no waste combustion facility in the United States has ever applied either of these control technologies. (*Id*. at 67.)

With regards to fixed bed technology, the available data is sparse and does not show better performance than mass burn MWCs using CDI systems and RDF fueled MWCs without CDI. That is, the data does not show that, "fixed bed systems would provide superior performance for dioxin/furan or mercury emissions as compared to an RDF fueled MWC with or without additional CDI". (WSREC Br. at 68-69.) WSREC insists that the only data available for fluidized bed systems was a pilot scale plant, which would not be commercially available under BACT. (WSREC Reply at 39.) Finally, fixed bed carbon technology is substantially more expensive than CDI and more prone to accidental fires. (WSREC Br. at 68,69.) WSREC takes issue with the Agency's claim that fixed bed carbon systems are available, because the Agency's examples are primarily not MWCs. (WSREC Reply at 39-40.) Without comparable data on the same type of incinerators and amount of carbon already present in the flue gas stream, comparing data to WSREC's emissions is invalid. (*Id*.)

With regards to fluidized bed technology WSREC claims: there are no commercial applications even in the foreign markets, performance and cost data to evaluate the commercial or technical availability is practically nonexistent, and the limited initial performance data shows removal efficiencies slightly lower than those at the mass burn MWCs with SDA and CDI systems and at RDF MWCs with no carbon control. (WSREC Br. at 67, Pet. Exh. 16 at 31.) In sum, WSREC claims that such technologies are unproven technically and economically unavailable, thus cannot be BACT.

WSREC states that none of the available information supports a conclusion that FB or CFB carbon adsorption technologies would be more effective than CDI to reduce emissions of dioxin/furans and mercury. WSREC asserts that although FB and CFB systems are being installed at several hazardous waste and MSW combustion facilities in Europe, including

Scandinavia, there is inadequate data concerning the performance of these technologies to conclude either system would be more effective than CDI systems.

The Agency relies on USEPA guidance on the USEPA NSR Manual and "Top-Down BACT" guidance in reviewing BACT proposals. (Agency Br. at 53, Ftn. 44.) According to the Agency, the proposed NSPS established emission limits for dioxin/furans and mercury applicable to WSREC do not establish BACT. Actually, NSPS set "minimum requirements for the construction of new or modified projects meeting the applicability criteria". (Agency Br. at 54, citing the NSR Manual, Res. Exh. 5 at B12; Tr. 2513.) The Agency states that under USEPA guidance, and the federal definition of BACT (which is substantially similar to Illinois' definition), "BACT can be more stringent than NSPS, but cannot be less stringent." (*Id*.) BACT is established on a case-by-case basis at the time a construction permit is issued; it can be more stringent than a NSPS, but not less. (Agency Br. at 54-55.)

The Agency examined WSREC's air application proposed as BACT for controlling dioxin/furans and mercury, and found that although the proposed emission limits were consistent with the emission limits in the proposed NSPS, WSREC was required to, and did not demonstrate that these control measures and the emission limits it proposed were BACT. (Agency Br. at 54-55.) The Agency states that at no time did it assert that a FB or CFB system was BACT for the project or that a lower emission limits for dioxin/furans and mercury was required as BACT. The Agency contends that the air application did not contain sufficient data or support to eliminate the FB and CFB technologies and a lower emission limit as BACT for the project. (Agency Br. at 60.)

Under USEPA's NSR Manual and the "Top-Down BACT" guidance used by the Agency, there are five steps involved in determining BACT. The first step is to list all control technologies including LAER. The second step is to eliminate technically infeasible options. Such elimination should be based on physical, chemical and engineering principles and a demonstration of technical infeasibility should be clearly documented. The third step is to rank remaining control technologies by control effectiveness. The ranking should also consider factors such as the expected emission rate, expected emission reduction, energy impacts and environmental impacts. The fourth step is to determine the most effective controls and document results. This includes a case-by-case consideration of energy, environmental and economic impacts. The fifth and final step is to select the most effective option as BACT. The Agency asserts that WSREC did not make such a step by step determination for BACT. Although the Agency does not necessarily disagree with the general assertion that adding additional carbon will not result in any significant further reductions, the Agency feels that this general concept must be specified to the WSREC proposal and supported with the appropriate data.

The Board agrees with the Agency that there is no evidence to support WSREC's assertion that the addition of carbon to the fluegas of a RDF would not further reduce emissions of dioxin/furans and mercury from the project. (Agency Br. at 58-59.)

The Agency argues that the air application and testimony from WSREC witnesses demonstrated that other, potentially more effective carbon adsorption systems were available. For example, FB was available for MSW incinerators and used at 11 facilities (where 7 would begin operation between 1994 and 1998). (Agency Br. at 56.) CFB, although limited in use, was identified at one plant in Germany, and proposed for a plant in Italy, with a comparable cost and lower emission rates than those proposed by WSREC.

In general, the Agency takes issue with how WSREC characterizes a control technology as "available". According to the Agency a control technology is "available" if it has reached the licensing and commercial stages of development. According to the Agency citing USEPA "Top-Down" BACT Guidance Document, March 15, 1990, "(t)he fact that a control option has never been applied to process emission units similar or identical to that proposed does not mean it can be ignored in the BACT analysis if the potential for its application exists". (Resp. Exh. 4 at 18, emphasis added.) The Agency believes that the air application clearly indicates that the use of an FB system in an industrial/hazardous waste incinerator in Germany shows that this is not pilot testing, but proven and available. (Agency Br. at 57.) Although WSREC claims it was considered in the evaluation, the Agency asserts that the air application itself did not provide sufficient information to eliminate the FB and CFB systems based on economic factors, for instance it did not compare an FB system to the proposed CDI. (Agency Br. at 59.) WSREC disagrees and claims that although it should not have had to provide economic data since the data showed that an RDF MWC without any carbon control provided equivalent control to other MWCs with carbon control, it did anyway. (WSREC Reply at 40-41.)

The Agency further states that although the air application did contain an estimate for the application of a FB system to the project from Tampella Power, the estimate did not evaluate the cost effectiveness of a FB system as compared to the proposed CDI. (Tr. 2316-2317.) The analysis only evaluated impact of an FB system on the expected level of tipping fees required to be charged by the project for each ton of MSW accepted. The Agency asserts that the tipping fees charged by the landfill in the area was not quantified and neither the revenue generated from the sale of electricity and recovery of ferrous and non-ferrous scrap metals considered in the economic analysis.

We find that after reviewing the record, the information provided by WSREC to the Agency was not sufficient to evaluate whether FB or CFB technology is the BACT for control of dioxin/furans and mercury. Additionally, the economic analysis contained in the application was not adequate to conclude that FB and CFB technologies are not economically viable. A case-by case evaluation of available technologies is necessary to determine BACT and WSREC did not provide adequate information to perform such an evaluation. As a result, the information in the air application was not sufficient for the Agency to conclude that CDI is BACT for the project. The Board finds that the Agency's decision was justifiable given the lack of data in the application. In view of this, the Board finds that FB and CFB were not properly evaluated in WSREC's BACT determination, and accordingly the Agency's denial point 1.b(1) is affirmed.

Air Denial Point 1.b(2): BACT and NSPS for Dioxin/Furan Emissions

b. Section 9.4 of the Environmental Protection Act requires the Best Available Control Technology (BACT) for municipal waste combustors

* * *

(2) The emission tests submitted from similar municipal waste combustors show level of dioxin/furan emissions below the proposed New Source Performance Standard (NSPS) 40 CFR 60 Subpart Eb. The application does not adequately address why, based on these tests, BACT should not be set at a level below the proposed NSPS.

WSREC has a proposed dioxin/furans limit of 0.50 ng/dscm[35] for the first three years. Thereafter WSREC proposes to meet a standard of 0.20 ng/dscm. WSREC states that a permit limit which is more restrictive than the 0.20 ng/dscm is not acceptable. In this regard, WSREC believes that limited emissions data which are currently available do not support a conclusion that lower emission concentrations can be consistently and reliably achieved. The Agency states that the application did not adequately establish why the limit for dioxin/furans should not be set below the proposed level of 0.20 ng/dscm.

WSREC claims that its proposed emission limit of 0.20 ng/dscm after the fourth year of operation for dioxin/furan constituted BACT. (WSREC Reply at 41.) WSREC believes that it cannot meet a 0.10 ng/dscm TEQ limit for dioxin/furan emissions in the fourth year of operation because test results from RDF MWCs without CDI systems have not consistently maintained such low emission levels. Therefore, the 0.10 ng/dscm TEQ level for dioxins/furans has not been consistently achieved in practice and is not technologically or commercially viable, in part because permit limits are not-to-be-exceeded standards. However, WSREC claims that all the RDF MWC test data do indeed show highly efficient control systems given that the uncontrolled emission would be between 10 to 20 ng/dscm.

WSREC maintains that there is no data on the effect of applying a CDI system to an RDF MWC on dioxin/furan emissions because no such MWCs have been constructed and put into operation. There exists substantial doubt whether a CDI system will improve such RDF MWC emission levels because there is no test data showing emission levels with and without the CDI system.

WSREC states that although dioxin/furans emission levels below the proposed 0.20 ng/dscm limit have been achieved at some MWC plants, a number of similar facilities have not been able to achieve levels lower than 0.20 ng/dscm. In this regard, WSREC notes that dioxin/furans levels below 0.20 ng/dscm have been measured at the Southeastern Massachusetts Resource Recovery Facility (SEAMAS) facility. However, WSREC states that

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[35] All concentrations for dioxins/furans (PCDD/PCDF) are stated in nanograms per dry standard cubic meter, toxic equivalency, corrected to 7% O_2 (ng/dscm TEQ).

the particular unit at SEAMAS has only been in operation for two years and in that time only two test series have been conducted and reported to USEPA.

According to the Agency, the air application supported a dioxin/furan limit below the proposed NSPS, and did not demonstrate why the limit for dioxin/furans should not be set below the proposed level of .20 ng/dscm, TEQ. (Agency Br. at 59-60.) The air application shows that the emissions of dioxin/furans for other MSW incinerators, including mass burn incinerators using CDI, FB and CFB systems, in the United States and Europe measured emission rates below the emission limit proposed in the air application. The Agency believes the discrepancy between those tested emission rates and those proposed by WSREC require further investigation.

The Agency states that a limit of 0.10 ng/dscm at 11 percent O_2 has been set in Germany that is equivalent to 0.14 ng/dscm at 7 percent O_2. (Pet. Exh. 16 at 122.) The Agency further notes that the data supplied in the application show that the other MWCs, including mass burn incinerators using CDI, FB or CFB systems and RDF incinerators, consistently show measured emission rates below the emission limit proposed in the air application. (Pet. Exh. 16 at 17.) Additionally, the Agency notes that of 12 MSW incinerators using CDI in Europe, only three exceeded 0.10 ng/dscm. (Pet. Exh. 16 at 23.)

A review of the record indicates that nine out of twelve incinerators using CDI have consistently achieved emission levels of 0.10 ng/dscm. WSREC simply points out that it is possible to exceed 0.10 ng/dscm and, therefore, the limit for dioxin/furan should not be set at 0.10 ng/dscm. WSREC did not provide any technical discussion in support of 0.20 ng/dscm nor did it discuss why any number lower than 0.20 ng/dscm should not be considered as the permit limit.

If WSREC was concerned about whether or not a level lower than 0.20 ng/dscm could be consistently achieved, it could have proposed a limit based on the lowest level achieved on a consistent basis during the first three years of operation. It must be noted that the dioxins/furans limit is set at 0.50 ng/dscm during the initial start-up period of three years. In view of this, the Board finds that the information provided by WSREC was not adequate to justify the proposed dioxin/furan emission limit of 0.20 ng/dscm.

Conclusion

Based on the above, the Board finds that WSREC has not met its burden of proof that operating under the air permit as requested would not violate the Act or Board regulations. The Board will accordingly affirm the Agency's denial of the air permit application.

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

ORDER

The Illinois Environmental Protection Agency's February 27, 1995 decision to deny West Suburban Recycling and Energy Center's air quality construction permit application No. 94100001 is hereby affirmed.

The Illinois Environmental Protection Agency's February 27, 1995 decision to deny West Suburban Recycling and Energy Center's solid waste management development permit application dated May 26, 1994 is hereby reversed and this matter is remanded to the Agency. The Agency shall issue the solid waste management development permit with conditions consistent with this opinion and order.

IT IS SO ORDERED.

Board Member M. McFawn and Board Member J. Yi concurred, and K.M. Hennessey abstained.

Section 41 of the Environmental Protection Act, 415 ILCS 5/41 (1994), provides for appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the _____ day of _____, 1996 by a vote of _____.

_____
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board