ILLINOIS POLLUTION CONTROL BOARD
February 5, 1987

JOLIET SAND AND GRAVEL COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 86-159
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

JOHN L. PARKER (JOHN L. PARKER & ASSOC.) APPEARED ON BEHALF OF PETITIONER, AND

MICHAEL J. MAHER, ASSISTANT ATTORNEY GENERAL, AND JOSEPH R. PODLEWSKI APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J. Anderson):

This matter comes before the Board on the September 30, 1986 petition filed by Joliet Sand and Gravel Co. (Joliet) seeking review of the denial by the Illinois Environmental Protection Agency (Agency) of a renewal of the facility's operating permit. Joliet's sand and gravel processing plant is located at 2509 Mound Road in Joliet, Illinois, and engages in primary and secondary limestone crushing and related activities.

Although hearing was authorized by the Board's Order of October 9, 1986, evidentiary hearings did not take place until January 13-14, 1987. Hearings which had previously been set for November 19 and 25 and December 10, 1986 were convened but progressed as on-record, pre-hearing conferences at which discovery-related matters were discussed. The discovery process in this matter was unusually lengthy and contested, resulting in truncation of the time available in which to put on evidence at hearing for review by the Board. These matters are chronicled in the Board's Orders in response to various "emergency" and routine motions, and will not again be set forth in detail here. The Board incorporates by reference the following: Orders of November 6 and 20, 1986; Orders of December 18 and 23, 1986; and Orders of January 12, 22 and 26, 1987. Pursuant to leave granted by Order of January 26, 1987, the parties simultaneously filed briefs on February 2, 1987.

Finally, the Board notes that decision was originally due on January 28, 1987 pursuant to the 120 day decision deadline established in Section 40(a)(1) of the Environmental Protection Act (Act). Joliet waived this deadline until February 5 at the

commencement of the January 14 hearing, confirmed this waiver in writing on January 22, and then later on the same day extended the waiver through February 12. On January 26, Joliet further extended the decision deadline through March 5, in the context of a request for additional hearings. As the hearing request was denied for the reasons set forth in the Board's January 26 Order, decision is being rendered consistent with the waiver through February 12 to avoid issuance of a permit by operation of law.

PRELIMINARY MATTERS

Pending Written Motions

The earliest filed motion still pending is the Agency's December 30, 1986 motion for costs and a January 7, 1987 supplement thereto. Joliet filed responses in opposition on January 5 and 12. The motion seeks award of $154.77 to the Agency, these being the costs and salaries of three employees who appeared for hearing on November 25 pursuant to notice served November 24. At the pre-hearing conference held November 19, the Hearing Officer had stated that it was necessary to at least open the hearing scheduled for November 25 in order to comply with notice of hearing requirements. The Hearing Officer additionally noted, however, that in the event discovery was incomplete, that if either party or both parties were unable to proceed that the hearing would be continued. R. 11-19-86, p. 36, 38-39*. At the November 25 hearing, counsel for Joliet stated that he was not in a position to state that "we have enough discovery to permit us to properly present our case at this hearing... and therefore I ask that this hearing be continued". R. p. 63-64. This request was granted and none of the three witnesses were called. It is the Agency's position that Joliet knew that it would not need to "put on" its case on November 25, and that it had "needlessly caused the wasted and futile appearance of three Agency personnel who had rescheduled their workload to attend the scheduled hearing". Motion, 14.

While the Board believes that the imposition of the costs requested would be appropriate, the Board finds it impossible to do so. The Act specifically provides for the shifting of costs from one party to another in two instances. The first is pursuant to Section 42(f), authorizing payment of costs incurred by the Attorney General or State's Attorney by a person found to have committed "a willful, knowing, or repeated violation of the

---

* The transcript of the November 19 hearing is numbered pages 1 through 79. The transcript of the November 25 hearing begins again at page 1; the transcripts of the December 8 and January 13-14 continue pagination in sequence after the November 25 transcript. Reference to the November 19 hearing transcript is to "R. 11-19-86, p. ____" and to all others "R. ____".

Act." The second is pursuant to Section 31.1, authorizing payment of costs incurred by a person who has unsuccessfully appealed the issuance of an administrative citation. These specific grants of authority to shift costs militate against a finding that the Board has some general, inherent authority to shift these costs in cases which are not enforcement actions. The Agency's motion is therefore denied on the basis that it seeks relief beyond the Board's authority to grant. However, as this authority issue has not been fully briefed, the Board will entertain further argument in the context of a motion for reconsideration.

The next filed motion is the Agency's January 12, 1987 motion for dismissal with prejudice, to which Joliet filed a response on January 20. The motion asserts that Joliet has failed to comply with Hearing Officer Orders to provide both answers to interrogatories and production of documents, that this conduct was intentional and wrongful, and that as a result Respondent's case has been so prejudiced that the only appropriate remedy is dismissal of the action with prejudice.

In relation to this motion, the Agency on January 27 applied to the Hearing Officer for an Order finding non-compliance with an Order to answer interrogatories. Joliet filed a response in opposition on January 28. The Hearing Officer referred the matter to the Board on February 4. The Board finds that Joliet made a literal response to the interrogatory as drafted. While Joliet could have been more forthcoming, the Board cannot find that it did not comply with the Order.

In additional response to the motion to dismiss, the Board notes the described sequence of events may well have impeded the Agency's preparation and presentation of its case. Yet, based on the Board's review of the hearing record and in the absence of specific allegations as to the precise manner in which the Agency's case was prejudiced, the Board does not find that the extreme relief requested is warranted. The motion to dismiss is denied.

The next filed motion is Joliet's February 2, 1987 motion to correct typographical errors in the January 13-14, 1987 hearing transcripts. A similar motion to correct errors in the November 25 and December 8 transcripts was filed on February 4. The Board agrees with Joliet's characterization of these errors, and grants the motion to correct. The Clerk is directed to delete the words "proposed" from the errata sheets included in the motions, and to bind copies thereof in the originals of the hearing transcripts. The Board notes that its review of these changes was greatly facilitated by Joliet's submittal of copies of the transcript pages with corrections inserted by hand.

Finally, on February 4, 1987, Joliet filed a reply brief accompanied by a motion for leave to file instanter. The Agency filed a reply in opposition which asserts that a reply brief is procedurally improper under these circumstances, particularly since Joliet had filed no main brief, and requests that decision be made on the basis of the Record and its brief. It is clear that, for whatever reason, the Agency has not received Joliet's brief filed with the Board February 2. This disturbs some of the factual premises of the Agency's opposition. Notwithstanding, the Agency is correct that the simultaneous briefing schedule established by the Board does not provide for reply briefs. To accept a reply brief filed on the day before decision under circumstances where the Agency could not be given a reply opportunity because it had not received Joliet's brief would be unfair. It is additionally onerous to the Board to receive additional briefs on the day before a scheduled decision. The motion is denied.

Evidentiary Issues and Scope of Review

The remaining preliminary matters worthy of the Board's attention at this point are various assertions of error in regard to the Hearing Officer's conduct of the hearing. While some of these were reiterated in the final briefs, most are reflected only in the hearing transcript. The Board will not address all objections in detail, affirming all rulings not otherwise addressed.

The Board again affirms the procedures established by the Hearing Officer for presentation of testimony and evidence at the two-day hearing. The Board has repeatedly and exhaustively rejected Joliet's assertions that its due process rights have been violated, and will not here repeat the rationale stated in those Orders which have been incorporated herein by reference.

Before addressing the various evidentiary issues, the Board will briefly reiterate the scope of review of permit appeals generally, and more specifically as they relate to the sequence of events involved in the instant permit denial.

The Board's historic approach to permit denial hearings was best stated in Oscar Mayer and Co. v. IEPA, PCB 78-14, 30 PCB 397, 398 (1978):

> "Under the statute, all the Board has authority to do in a hearing and determination on a Section 40 petition is to decide after a hearing in accordance with Sections 32 and 33(a) whether or not, based upon the facts of the application, the applicant has provided proof that the activity in question will not cause a violation of the Act or of the regulations.

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

The Illinois Supreme Court, and various appellate courts have confirmed the validity of this approach, e.g. Waste Management, Inc. v. IEPA, PCB 84-45,61,68, Opinion and Order of October 1, 1984 and Supp. Opinion and Order of November 26, 1984, aff'd sub nom. IEPA v. IPCB, 138 Ill. App.3d 550 (3rd Dist. 1985), aff'd _____ Ill.2d ___, No. 63062 (December 19, 1986) (Board need not apply manifest weight of the evidence standard in reviewing Agency permitting decisions). In its permit denial letter, the Agency must specify all reasons for its denial of a permit, and is precluded from raising new reasons for the first time before the Board. IEPA v. IPCB, 86 Ill.2d 390, 404-405, 427 N.E.2D 162 (1981). The Board must consider the application as submitted to the Agency, and may not be persuaded by new material not before the Agency that the permit should be granted. IEPA v. IPCB and Alburn, Inc., 118 Ill. App.3d 772, 455 N.E.2d 194 (1983). To the extent that the Agency has relied upon information beyond that contained in the application, such information must be included in the permit record filed with the Board; if it is not, the applicant may properly submit such information to the Board during the course of the Board's hearing. Additionally, if there was information in the Agency's possession upon which it reasonably should have relied, the applicant may also submit such information to the Board for the Board's consideration. Waste Management, supra, Frinks Industrial Waste, Inc. v. IEPA, PCB 83-10, June 30, 1983; Sherex Chemical Co. Inc. v. IEPA, PCB 80-66, 39 PCB 527-528 (1980), aff'd sub nom. IEPA v. Sherex Chemical Co. and IPCB, 100 Ill. App.3d 735 (1981).

While the permitting chronology for the Joliet site will be discussed later in more detail, for the nonce the salient facts are as follows. Joliet's initial operating permit was issued on December 30, 1980, to expire on December 21, 1985. Joliet applied for renewal of this permit on December 16, 1985. The

Agency denied the renewal on March 7, 1986. Joliet submitted additional information on June 16, 1986 and again requested renewal of the permit. This renewal application was denied on August 26, 1986.

The Agency asserts that the correctness of the Agency's first permit denial on March 7, 1986 is not at issue here. The Agency argues that by failing to appeal that denial within 35 days as required by Section 40, Joliet has waived any right to contest error (R. 332-335, Agency Brief at 7-8). The Board agrees, and does not find persuasive Joliet's arguments that the first denial was not ripe for review until after the second denial (R. 333-334).

The Board agrees with Joliet that there is a "continuum" between the information considered by the Agency on March 7 and August 26: Joliet's June 16 letter in response to the March 7 denial (Pet. Exh. 21, R. Exh. 3) clearly indicates that it was intended to be supplemental to the December 16, 1985 application for renewal (Pet. Exh. 3). The Hearing Officer was correct in admitting evidence concerning the March 7 denial to the extent that such evidence could be relevant to correctness of the August 26 denial.

The Hearing Officer excluded several exhibits identified and offered by Joliet which consist of documents contained in the Agency's file relating to the original operating and construction permits issued for the Joliet facility. These are Petitioner's Exhibits 5, 6, 8, 9, 10, 11, 12, 13, 14, as marked for identification, and submitted to the Board by way of offer of proof. The Hearing Officer's exclusion of these exhibits is reversed, and they are admitted as evidence. As Joliet argued (see e.g. R.288-291), the application for renewal of an operating permit provides for incorporation of data from prior permits and requires certification that previously submitted information remains true and correct. The expiring operating permit in turn references the construction permit, which was issued on the basis of the application and information submitted in 1980. Without regard to the probative value to be assigned to this data concerning prior permitting history, Joliet has persuaded the Board that it cannot be excluded on relevancy grounds.

The Hearing Officer also excluded from evidence, but received offers of proof concerning, documents marked as Petitioners Exhibits 25, 26 and 27 for identification. These documents consist of calculations estimating emissions from Joliet's facility prepared by Andrew Rathsack, Joliet's consulting engineer. These exhibits were denied admission based upon the Agency's objection that the witness had not previously been made available for deposition concerning the calculations or other matters. R. 590-591. While the Board appreciates this

rationale, the Board will admit the calculations, which are self-explanatory.

PERMIT CHRONOLOGY

Witnesses

Seven witnesses were called by the parties. They are listed below with a brief description of their qualifications and relation to the permit issues.

Harish B. Desai, IEPA

In 1986, unit manager in the Agency's air permit section and supervisor of Anton Telford, who reviewed and initialed the permit denial letters drafted by Telford and signed by Mathur March 7 and August 26, 1986. Conducted no independent review of permit record. R. 543-547.

Bharat Mathur, IEPA

Between 1980-1986, Manager of the Agency's Air Permit Section. Signer of 1986 permit denial letters drafted by Telford. Conducted no independent review of permit record. Named author and signer of memo of October 9, 1986 prepared by Telford designating items in Agency permit record for this appeal. Pet. Exh. 2. Conducted no independent review. R. 535-542.

Andrew Rathsack, Andrews Environmental Engineering, Inc.

Involved in preparation of Joliet's permit applications since 1980. R. 585-609.

Christopher Romaine, IEPA

Manager of the New Source Review (NSR) Unit in the Agency's air permit section. As it related to NSR, reviewed and initialed August 26 denial letter drafted by Telford. Conducted no independent review of accuracy of calculations. R. 619-638.

Anton Telford, IEPA

Permit Engineer in the Agency's air permit section. Analyzed Joliet's December, 1985 and June, 1986 permit renewal applications and drafted denial letters. Generated calculations relied on by other Agency personnel. Designated documents filed with the Board on October 24, 1986 as Agency Record.

Martin Tippin, IEPA
William Zenisck, IEPA

Each is an environmental protection specialist in the Agency's air permit section, and a certified smoke reader. Each has conducted compliance inspections at the Joliet facility within the past three years, and has made visual opacity readings.

The Joliet Permits

Joliet Sand and Gravel Co., then owned by Rein, Schultz and Dahl of Illinois, Inc., filed its application to construct and operate a sand and gravel processing plant on May 29, 1980. Pet. Group Exh. 14. The equipment referenced in the application was a primary jaw-crusher identified as Pioneer Model 3042, a secondary roll crusher identified as Pioneer Model 2454, and a Pioneer Model 526 F screen. Resp. Exh. 14-L. The Agency denied the permit on July 28, 1980 due to Joliet's failure to submit calculations for projected, uncontrolled and controlled particulate emissions and fugitive emissions. Pet. Exh. 12,13. Joliet submitted a revised construction permit application on September 24, 1980. Pet. Group Exh. 11. In reviewing this application, the Agency's permit analyst, based on the use of AP-42, a calculation method published by USEPA in 1975, calculated uncontrolled emissions as 72 tons per year (TPY) allowable emissions as 113 TPY, and controlled (actual) emissions as 7.2 TPY, and suggested restrictions in the facility's operations. Pet. Exh. 9.

A construction permit was issued on October 24, 1980, which contained conditions restricting operations to 3600 hours per year, controlling process weight rate to 400 tons per hour, and requiring a 10% moisture content in raw materials "to keep all emissions small". Pet. Exh. 8.

Joliet again applied for an operating permit on November 6, 1980. Pet. Exh. 6-7. The Agency's permit analyst calculated uncontrolled emissions as 72 TPY, allowed emissions as 112 TPY, and controlled emissions as 7.2 TPY. Pet. Exh. 5. The Agency operating permit was issued on December 30, 1980, subject to the same conditions as in the construction permit. The expiration date of the permit was December 21, 1985. Pet. Exh. 4.

Five days before expiration of this operating permit, Joliet filed a two page application for renewal of its prior permit which certified that the operation had not been modified and that it was in compliance with all regulations. Pet. Exh. 3. Telford's "Calculation Sheet" analyzing the application noted that 5 warning letters had been issued since 1982 concerning alleged excessive particulate emissions and opacity readings caused by operation of the "Spokane" and "Steadman" crushers.

Telford recommended denial "because of excess emissions from the Steadman Crusher on 5-14-85". Pet. Exh. 15. (It is nowhere in this record explained when, or under what authority, these crushers manufactured by Spokane and Steadman replaced or were added to the permitted crushers manufactured by Pioneer.)

On March 7, 1986, the Agency denied the renewal permit. Pet. Exh. 16. The denial letter specified the following reasons for denial: 1) particulate emissions in excess of the 30% opacity limitation of 35 Ill. Adm. Code 212.123 based on field inspections; 2-3) particulate emissions in excess of those allowed by 35 Ill. Adm. Code 212.321 for both the Steadman and Spokane Crushers, based on calculated emissions levels since actual emissions data had not been provided; 4) violations of fugitive particulate limitations of 35 Ill. Adm. Code 212.301, based on field observations; and 5) failure to provide information of compliance with Special Condition 3 of the operating permit, requiring 10% moisture in raw materials. The letter noted that the Agency would be pleased to reevaluate the application on receipt of written request and additional documentation.

At hearing, Telford testified that the calculations referenced in reasons 2 and 3 had been made on the basis of the 1975 AP-42; this document had been superseded by a revised AP-42 issued by USEPA in September, 1985. Pet. Exh. 19,20.

In response to this denial, on June 16, 1987, Joliet's engineer Rathsack submitted a letter requesting issuance of a renewal permit. The letter proposed replacement of the Steadman and Spokane crushers which together have a rated capacity of 575 tons per hour (TPH) with a new Spokane crusher with a rated capacity of 600 TPH. Emissions for the new crusher were calculated by Rathsack pursuant to the 1985 AP-42 emission factor to be within the allowable rate. Deletion of the 10% moisture condition was also requested, on the basis that the raw materials were classified by AP-42 as "wet material" by virtue of their 2% moisture content, and that supplemental spraying would be used. It was further explained that a new well had been drilled to supply water to the spray bars on the process line to control excess opacity and particulate emissions, and that a water truck had been purchased to spray site roads to control those fugitive emissions.

Telford's calculation sheets (Pet. Exh. 22) express concerns prompting him to recommend denial, which concerns were incorporated in the August 26 denial letter. Pet. Exh. 22. The permit was denied because of potential violations of 35 Ill. Adm. Code 201.142, 201.157, 212.321, 203.201 and 203.770. The letter additionally stated that in general, the application failed to contain the minimum information required by Board rules to allow the Agency to determine compliance with the Act and regulations,

and more specifically that 1) the informational requirements of Section 230.770 regarding compliance of the new crusher and any new conveyors with respective 10% and 15% opacity limits were not met, 2) calculations of particulate emissions for the primary and secondary crushers indicated that particulate emissions limitations would be exceeded, based on a calculated 50% effectiveness rate for use of water in the spray bars rather than a surfactant, and 3) that construction of the new crusher would involve a major modification of a major particulate emission source located in a non-attainment area, requiring a submission of various information required by 35 Ill. Adm. Code Part 200.

REASONS FOR DENIAL

At the outset, the Board must comment that dealing with this record poses some difficulty because of the lack of clarity concerning the precise identity of the crushers involved. It is clear only that on June 16 Joliet proposed to operate a primary and secondary crusher of some manufacture on the site (Pet. Exh. 21 L), and that a Steadman and Spokane crusher were in operation on that date (Pet. Exh. 21A). It appears that one or both of the originally permitted Pioneer crushers have been replaced (R. 605-606).

Section 201.157: Contents of Application

35 Ill. Adm. Code 201.157 specifies that, as a minimum, the operating permit shall contain the data specified in Section 201.152 "Contents of Application For Construction Permit". That section requires, among other things, information concerning the "nature of the emission source", and "type, size, efficiency, and specifications...of the proposed emission source". The Agency correctly determined that an application for an operating permit is deficient where the identity of the equipment proposed to be operated is nowhere specified in the application. This reason for denial is affirmed.

Section 201.142: Required Construction Permit

Section 201.142, which is cited in the first sentence of the denial letter, provides that "no person shall...cause or allow the modification of any existing emission source...without first obtaining a construction permit." The evidence is uncontroverted that no construction permit relating to the new 600 TPH Steadman crusher was ever applied for, let alone issued. This reason for denial is affirmed.

Section 203.770: Opacity Standards

35 Ill. Adm. Code 203.770 incorporates 40 CFR Part 60 which is entitled Standards of Performance For New Statutory Sources, Nonmetallic Mineral Processing Plants. Final Rule 40 CFR 60

promulgates standards of performance for new emission sources. Because such facilities contribute significantly to air pollution, the intended effect of these standards is to require all new, modified and reconstructed mineral processing plants to achieve emission levels that reflect the best demonstrated systems of emission reductions. 40 CFR Part 60, Summary, Vol. 50 No. 148, Thursday, August 1, 1985.

Section 60.676 [C] limits fugitive emissions from crushers to a maximum of 15 opacity and 60.676 [B] limits these emissions from all other sources to a maximum of 10% capacity.

No data was presented in the application regarding the Joliet operations' ability, using the proposed new crusher and new conveyors, to comply with these limitations. Joliet has not argued that these limitations do not apply to its facility. For these reasons, this reason for denial is affirmed. In so holding, the Board has given no weight to the facility's alleged opacity violations relating to operation of the existing crushers, as this is irrelevant to the new operation as proposed. (See also Waste Management, supra, Prinks, supra, and Fritz Enterprises, Inc. v. IEPA, PCB 86-76, September 11, 1986 concerning alleged violations and the Agency's permit determinations.)

Section 203.201: Major Modification of a Major Emission Source

35 Ill. Adm. Code 203.201 provides in pertinent part that:

> "No person shall cause or allow the construction of a new major stationary source or major modification in an area designated as nonattainment as defined at Section 171(2) of the Clean Air Act [42 USC 7501.2]...except as in compliance with this part for that pollutant."

It is undisputed that Troy Township, Will County, Illinois, where Joliet's facility is located is designated as a non-attainment area for particulate emissions, that is, the national ambient air quality standard for this pollutant has not been met. The dispute is whether Joliet is a major source seeking to make a major modification. Such sources located in non-attainment areas are subject to more stringent permitting and emission control requirements known as the "New Source Review" rules, than are such sources located in attainment areas, since the clean air goals for the area have not been achieved.

For purposes of this discussion, a major source is one which has a "potential to emit" 100 tons per year, or more, of any pollutant. 35 Ill. Adm. Code 203.206. "Potential to emit" is defined as a source's maximum capacity to emit pollutants under its physical and operational design; in determining this design

capability a source may take into account any enforceable limits (such as those contained in permit conditions) on hours of operation, amount of materials processed or required air pollution control equipment. 35 Ill. Adm. Code 203.128.

This record does not contain calculations specifically labelled as "potential to emit", although it does contain calculations of "allowable emissions". Section 203.107 defines "allowable emissions" in essence as the maximum emissions capable of being produced by a source taking into account operations limitations imposed by permit conditions. The uncontroverted evidence in this record is that Joliet's allowable emissions rate would be used in determining the applicability of Part 203. R. 630.

The Agency's calculation sheets for the original permits show an allowable emissions rate of 112 TPY. Pet. Exh. 5,9. At hearing, Joliet's engineer Rathsack calculated the maximum allowable emissions for Joliet's primary crusher as 112 TPY.

Telford did not rely upon these figures at the time of permit denial, but instead upon a maximum allowable emissions limit of 156 TPY, a figure which he obtained by consulting the Agency's Total Air System (TAS) computer system. No witness presented at hearing was able to testify as to the derivation of that number. For this reason, Joliet asserts that this reason for denial should be reversed.

While Telford relied on an unverified allowable emissions rate over 100 TPY, Joliet has presented no evidence that contravenes other evidence in this record that its allowable emissions rate is over 100 TPY. Joliet's references to its projected controlled (actual) emissions rate are irrelevant to its potential to emit. The Board finds that the Agency was correct in determining that Joliet is a major source.

The next issue is whether Joliet had proposed a major modification. For particulate emissions, a major modification is one which would result in an increase in actual emissions of 25 TPY. 35 Ill. Adm. Code 203.207, 203.208, 203.209. As Joliet had not supplied actual emissions data, calculations were made using the 1985 AP-42 emissions factor. Pet. Exh. 22.

AP-42, Table 8.19.2-1, sets forth an emission factor of 0.28 pounds per ton for primary or secondary crushing of dry material, and 0.018 pounds per ton for wet material. A factor of 1.85 is assigned to tertiary crushing of dry material. Wet material is that which contains either naturally, or after moistening, "1.5 to 4 weight %". Footnote b notes that typical control efficiencies for wet spray systems are 70-90%.

In his June 16 letter, Rathsack stated that the moisture content of Joliet's rock is 2.0%. Consequently, he used the 0.018 figure to calculate the actual emissions from the proposed new shredder to be 10.8 lb/hr.

In analyzing the permit request on his calculation sheet, Telford had noted Joliet's maximum emissions as 156 TPY and average emissions as 88 TPY, based on the data in the TAS computer. In calculating emissions, Telford first used the 0.28 dry material factor and the tertiary factor of 1.85; at hearing. Telford explained that he had used the dry material factor for the primary crusher because "there was no spray bar in the crusher, because there is no guarantee that the moisture will be sufficient to adequately suppress dust that will arise in the crushing operation (R.772). He arrived at a total of 263.14 TPY of uncontrolled emissions, as compared to allowable emissions of 77.33 TPY. Telford then calculated uncontrolled (actual) emissions using the same 0.28 factor but giving credit for spray bars using surfactant spray (which were not proposed) and arrived at a 65.67 TPY increase. Telford did not give credit for use of water sprays as he felt that these are less than 50% effective. At hearing, Telford testified that even if a wet emission factor had been used that Joliet's proposed modification would still be a major one, although he did not provide his calculations (R.775). Finally, Telford also made calculations using the "old Permit Manual Method".

Joliet asserts that the permit manual method of calculation is improper, as that manual is an unpublished, in-house document. The Board will not address this contention, as the Agency has relied upon only the AP-42 calculations in defending the denial.

Joliet further asserts that use of the dry factor was clear error since Joliet's material is "wet", having a natural moisture content of 2%. It argues that AP-42 gives the permit analyst no discretion to use the significantly higher "dry" factor. Joliet calculates that, based on 4992 hours of production, that its maximum controlled emissions would be 13.47 TPY Pet. Exh. 25. Based on the production limits in its current permit, of 2.440 hours, it calculates that its maximum emissions would be 18.14 TPY. Pet. Exh. 26. It compares these figures with calculations using the new AP-42 factors as applied to the equipment permitted in 1980, which would result in maximum emissions of 14.26 TPY. Pet. Exh. 27. Thus, Joliet asserts it is not a source which even after the proposed modification can be calculated to emit 25 TPY, let alone one which is seeking to make a modification resulting in a net emission increase of 25 TPY.

In its application, Joliet provided the natural 2% moisture content of its raw materials, information allowing for calculation of its emissions, and some calculations using the

1985 AP-42 "wet" factor. Joliet carried its preliminary burden of proving that its controlled (actual) emissions did not result in a 25 TPY net increase, and that it was therefore not proposing a major modification.

The Board cannot find that the Agency has made a valid use of the AP-42 "dry rock" calculation factor. There is no information in this record which substantiates a finding that the Agency was correct in determining that Joliet's proposed modification was "major" in the meaning of the new source review rules, and the Agency's determination is hereby reversed.

Section 212.321: Particulate Emissions Limitations

The Agency's calculations of the allowable particulate emissions for both the primary and secondary crushers were made on the basis of the invalid use of AP-42 discussed above. This reason for denial was accordingly also improper.

Joliet's Additional Arguments and Closing Offer of Proof

The Board wishes to make explicit that in reaching its determination, the Board has considered the offer of proof made by Joliet at the time that the Hearing Officer required Joliet to close its case. R. 611-614. Joliet has made no offer of proof regarding the denial reasons which the Board has sustained, which are failure to obtain a construction permit, failure to specify exactly what equipment it was seeking to operate, and failure to provide data concerning opacity of fugitive emissions from the proposed new equipment. The evidence Joliet placed in the record was sufficient to persuade the Board that calculations derived from a misapplication of AP-42 were invalid.

One issue not heretofore specifically addressed is the incompleteness of the record as filed by the Agency in October, 1986. It is true that the record was incomplete as indicated by exhibits submitted by petitioner and entered into the record. One purpose of the hearing before the Board is to allow for completion of the Agency record, as has been done here. The filing of an incomplete record by the Agency provides no grounds in and of itself for reversal of the Agency's permitting decisions, particularly where, as here, the omissions are not major and there is no indicia of any bad faith "cover-up". Moreover, the Agency's filing omission most certainly pales in comparison to Joliet's failure to file timely and complete applications for construction and operating permits.

SUMMARY

In summary, the Board finds that the Agency correctly denied the permit on the basis of Joliet's failure to provide sufficient information to demonstrate that its facility would not cause

violations of Sections 201.142, 201.157, and 203.770. The Agency incorrectly denied the permit on the basis of Sections 212.321 and 203.201. However, as there were three valid reasons for denial of this renewed operating permit, the Agency's denial is affirmed.

FINAL REMARK

The Board must make one final remark concerning the manner in which this appeal has been pursued.

The Section 40 decision deadline was enacted to shield the regulated community from bureaucratic delay in decisionmaking; in this case it has been used by petitioner as a sword against the Agency and the Board. Any time problems experienced by petitioner at the close of this case have been of its own making as a result of pursuit of objectives largely unrelated to the issues which have been here addressed.

It appears to the Board that discovery in this permit appeal action has been sought for use in the pending PCB 86-108 enforcement action. In any event, it is clear that petitioner has attempted to put the Agency "on trial" in this action, rather than shouldering its burden to prove that the permit information it had supplied to the Agency was sufficient to show compliance with the Act and Board regulations. As a result, petitioner's discovery demands and repeated requests for immediate Board rulings thereon have placed excessive burdens on the scarce personnel and fiscal resources of the Agency, the Attorney General, and the Board, and particularly when viewed in light of the irrelevant arguments which much of the information has been used to support. The Board cautions against employment of such procedures in any future permit appeal proceeding.

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

ORDER

The Agency's August 26, 1986 denial of the June 16, 1986 application by Joliet Sand and Gravel Co. for renewal of its operating permit is hereby affirmed.

IT IS SO ORDERED.

J. T. Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 5th day of February, 1987 by a vote of 5-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board