ILLINOIS POLLUTION CONTROL BOARD
November 26, 1984

WASTE MANAGEMENT, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 84-45
	)	84-61
ILLINOIS ENVIRONMENTAL	)	84-68
PROTECTION AGENCY,	)	(Consolidated)
	)	
Respondent.	)	

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

As stated in the Board's Order of October 25, several motions for reconsideration of the Board's Opinion and Order of October 1, 1984, were filed on or before the October 12 deadline established therein. These motions are those of: October 9 - Topolski, October 10 - Ruettiger, Rourke, Brockett, October 11 - Marr, October 12 - the Agency, by the Attorney General. A motion received October 15 from Judy Garthus bearing an October 4 date was also accepted by the Board.

The Agency also filed a motion for stay of the October 1 Order pending appellate review. Waste Management, Inc. (WMI) filed a response in opposition to all pending motions on October 22, 1984. The response included motions to strike various portions of the above-listed motions.

The various motions for reconsideration were granted in the Board's Order of October 1, but consideration of the merits of the various motions was deferred pending receipt of supplemental briefs on the issue of the evidentiary standard to be applied by the Board in permit appeal actions, as well as any "points of error" previously raised. The Agency filed its supplemental brief on November 5, 1984 declining to address, except in passing, issues other than the standard of review questions. Waste Management, Inc. filed a response on November 16, 1984, which included a renewal of its motion to strike various portions of the Agency's submittals.

This Supplemental Opinion and Order disposes of all pending motions.

MOTIONS TO STRIKE

The Board will first turn to WMI's motions to strike. WMI objects to various portions of the citizen's motions to the extent that they include new factual matters not previously placed in the lengthy record in this matter (see, e.g. Topolski Brief, p. 2, Rourke Brief p. 4 regarding liner compatibility studies). The motion is granted. However, the Board will not, as WMI did not, specify on a line-by-line basis which portions of these filings are improper, but will instead consider only arguments based on the law or evidence in this case.

As to the filings of the Agency, by the Attorney General, WMI initially objected to "misrepresentations of fact, mis-characterizations of testimony, references to matters not of record, . . . [lack of] proper citation to the transcript . . . [and] vituperative accusations that the Board has ignored 'the real concerns of the Illinois citizens' . . . " (WMI October 12, 1984 Brief, p. 1-2). WMI objected to the Agency's supplemental brief on the grounds that it "continues the improper practice found in its prior brief of making references to matters not of record" (WMI October 16, 1984 Brief, p. 1 n. 1). WMI urges the Board to strike such material to keep the record in this matter clear for the benefit of a reviewing court.

The Board agrees with WMI's characterizaton of much of the Agency's briefs; assertions and arguments of this style and content are not acceptable (see e.g. Agency Motion to Reconsider, p. 2-4, 15). The Board will again grant WMI's motion, but again declines to embark, as WMI again did not, on a line-by-line analysis of 48 pages of briefs.

RECONSIDERATION OF THE MERITS

Initially, the Board must note that the various motions to reconsider have challenged the Opinion and Order by generally disagreeing with all legal conclusions and findings of the Board adverse to the position of the movant. The Board will not discuss all aspects of these various motions in detail, but will address only the major points. The Board will recapitulate evidence in the action only to the extent necessary to deal with these points.

Intervention: Order, Paragraph 3

At pages 2-4 of its October 1 Opinion, the Board overruled its hearing officer's allowance to various citizens of intervention on a "briefs only, no cross-examination" basis. The ruling was based on a finding of lack of explicit legislative authority for allowance of intervention in permit appeal cases, and an interpretation that Landfill, Inc. v. PCB, 74 Ill. 2d 541,

387 N.E. 2d 258 (1978) would serve to invalidate any Board rule purporting to grant such rights. Various citizens (e.g. Topolski Brief p. 3, Rourke Brief p. 4) argue that the Landfill decision is distinguishable, because the landfill permit involved there did not involve a hazardous waste facility. That is, however, what the lawyers call a "distinction without a difference," and does not make the case inapplicable to this situation. Arguments concerning the general language of 35 Ill. Adm. Code Part 103 (e.g. Agency Motion to Reconsider, p. 16) beg the question of the validity of such language, if applicable. The Board accordingly reaffirms its prior Opinion and paragraph 3 of its Order.

The Board does, however, wish to correct a common misinterpretation of its Opinion. Various citizens (e.g. Brockett Brief) have read the Board's recitation of WMI's arguments concerning lack of adverse effect at page 2 of the Opinion as a finding of the Board to this effect. The Board's belief that a sufficient showing of adverse effect had been made is indicated in the footnote to page 4.

Standard of Review

In its initial Opinion, the Board did not specifically articulate the standard of review it applies in permit appeal cases. The Board had, however, followed the approach established in its earlier cases. This approach was best stated in Oscar Mayer and Co. v. IEPA, PCB 78-14, 30 PCB 397, 398 (1978) [quoted for other reasons in the passage from IEPA v. IPCB, 86 Ill. 2d 390, 427 N.E. 2d 162 (1982) appearing at p. 26-27 of the Opinion]:

> "From the beginning the Board experienced some difficulty in structuring the hearing on a Section 40 petition. One of the continuing reasons therefore has no doubt been the early styling of the proceeding in Board practice as a 'permit denial appeal.' It is obviously not an appellate review of an administrative decision, nor could it seem to be so when there has been no recorded hearing and written finding of fact at the permit issuance level.*** Under the statute, all the Board has authority to do in a hearing and determination on a Section 40 petition is to decide after a hearing in accordance with Sections 32 and 33(a) whether or not, based upon the facts of the application, the applicant has provided proof that the activity in question will not cause a violation of the Act or of the regulations.
>
> In a hearing on a Section 40 petition, the applicant must verify the facts of his application as submitted to the Agency, and, having done so,

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

Various cases have upheld the Board's determinations based on this approach, e.g., IEPA v. IPCB, supra, and the validity of the approach has been the subject of dicta, SCA Services, Inc. v. IPCA, 71 Ill. App. 3d 715, 717, 389 N.E. 2d 953 (1979) ["The language of [Section 40] of the Act does not describe such procedure in the context of appellate review within the administrative agency's system. It appears that the Board has reached this conclusion. (Citation to Oscar Mayer)."] However, the Board is not aware of an appellate permit appeal case in which the application of any other standard of review was explictly argued and addressed.

In its motion for reconsideration, the Agency asserts that the manifest weight of the evidence standard applies. In support thereof, it cites several recent cases interpreting Section 40.1 of the Act, providing for Board review of local government determinations under Section 39.2, of the site location suitability of new regional pollution control facilities. These are City of Rockford v. Pollution Control Board, 125 Ill. App. 3d 384, 465 N.E. 2d 996 (1984); Waste Management of Illinois, Inc. v. Pollution Control Board, 123 Ill. App. 3d 639, 461 N.E. 2d 542 (1984); City of East Peoria v. Pollution Control Board, 117 Ill. App. 3d 673, 452 N.E. 2d 1378, (1984), vacated, (No. 59110, May term 1984)*; E & E Hauling v. Pollution Control Board, 116 Ill. App. 3d 586, 451 N.E. 2d 555 (1983).

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*The Board will not consider Agency arguments based on this vacated case.

Primary reliance is placed on the analysis of the Appellate Court for the Second District in City of Rockford. In that case, Frink's Industrial Waste had argued that the E & E Hauling case, in which the court had first adopted the standard, was wrongly decided on the grounds that the manifest weight standard should be applied only to an administrative agency with recognized pollution control expertise. The Second District determined that it would adhere to the standard pending Supreme Court review (presumably of the E & E Hauling case, No. 58993 on the Supreme Court's docket). After an analysis of Section 39.2 as establishing a "uniform set of zoning standards for the location of regional pollution control facilities throughout the state," the court went on to say that:

> "Comparing section 39(a), granting the agency general authority to issue permits, with section 39.2, granting the local governmental entity authority to approve site location, it appears that the local governmental entity has been given the adjudicatory function otherwise located in the [Illinois Environmental Protection] agency itself. The fact that the statute contains parallel review procedures in section 40 (Ill. Rev. Stat. 1983, ch. 111½, par. 1040, providing for Board review of Agency denial of permits), and in section 40.1 (Ill. Rev. Stat. 1983, ch. 111½, par. 1040.1, providing for Board review of local governmental entity denial of site location approval), reinforces the view that in site location decisions the local governmental entity performs an adjudicatory function. Adjudicatory decisions made by an administrative agency are reviewed under a manifest weight of the evidence standard. See, Wells Manufacturing Company v. Pollution Control Board (1978), 73 Ill. 2d 226, 234, 22 Ill. Dec. 672, 383 N.E.2d 148; Environmental Protection Agency v. Pollution Control Board (1980), 88 Ill. App. 3d 71, 77, 43 Ill. Dec. 98 410 N.E. 2d 98." 465 N.E. 2d at 999.

Citing Landfill, Inc. for the proposition that the Board is not to become the overseer of the Agency decisionmaking process in the permit arena, the Agency argues that the relative sizes of the appropriations to the Agency and the Board reflect a legislative intent to restrain the scope of the Board's review of Agency permit decisions.

In its reply, WMI maintains that given the lack of a stated statutory evidentiary standard, the Board--just as a court reviewing an administrative decision in such circumstances--must conduct a de novo inquiry into the issues, Banker's Life and Casualty Co. v. McCarthy, 11 Ill. App. 2d 334, 137 N.E. 2d 398 (1956); Rockford v. Comption, 115 Ill. App. 406 (1904). WMI

distinguishes the cited landfill siting cases. It notes that these cases do not "consider whether an administrative agency's review of another agency's findings serves a purpose different than that served by judicial review of an agency's findings". WMI observes that many of the citations supporting the courts manifest weight applicability findings in the siting cases involve judicial review of the Board's actions where Section 41(b) of the Act specifically so provides, or judicial review of agency actions pursuant to the Administrative Review Act, which also specifically provides for application of the manifest weight standard (WMI November 16, 1984 Brief, p. 14, n. 5).

WMI suggests that a principled analysis of and comparison between the Agency permitting mechanism of Sections 39(a) and 40 of the Act and the local government site location suitability approval mechanisms of Sections 39.2 and 40.1 of the Act makes clear that the proceedings are not, in fact, analogous. Local governments' site location decisions under Section 39.2 are to be made in writing, and stating the reasons therefore, on the basis of a transcribed record of a public hearing; this hearing has been uniformly held by the courts to be adjudicatory in nature, e.g. E & E Hauling, supra. In making permit decisions under Section 39(a), the Agency is required to provide written reasons for its decision only in the event it concludes that issuance of a permit would violate the Act or Board regulations; no reasons need be provided for inclusion of permit conditions. WMI argues that, in contrast to Sections 39.2 and 40.1 siting proceedings in which "fundamentally fair procedures" are mandated, Sections 39(a) and 40 dictate no procedures:

> "No procedures are utilized to insure that all information necessary for that determination is actually before the decision makers; no procedures, such as cross-examination, are available to test the validity of the information and opinions relied upon by the decision makers; no requirement is imposed that the decision makers act upon a hearing record (indeed, no opportunity for a formal hearing is provided); and, no guarantee is provided that the determination is reached by an impartial decision maker through a proceeding where adversaries can put forth evidence to support their respective positions." (WMI November 16, 1984 Brief, p. 14).

WMI remarks that P.A. 82-682, in adding Section 39.2 to the Act, deleted old Section 39(c), which had required that:

> "Immediately upon receipt of a request for a permit or supplemental permit for a refuse disposal facility, the Agency shall notify the State' attorney and the Chairman of the County

> Board of the county in which the facility is located and each member of the General and to the clerk of each municipality any portion of which is within 3 miles of the facility, prior to the issuance of a permit to develop a hazardous waste disposal site, the Agency shall conduct a public hearing in the county where the site is proposed to be located."

WMI therefore concludes that the observation of the City of Rockford court that Section 39.2 gives local government "the adjudicatory function otherwise located in the [A]gency itself" is a reference to the transfer of authority to conduct an adjudicatory hearing on site location. To the extent that a deferential review standard has been afforded by the court to Agency decisions after Section 39(c) procedures were followed, Hillside v. Sexton Sand & Gravel Corp., 113 Ill. App. 3d 807, 447 N.E. 2d 1047 (1983), WMI argues, such deference is no longer well-founded.

As to the Agency's Landfill Inc. argument, WMI's response is that the case stands for the proposition that Board involvement in the permitting process is improper to the extent that the challenged Board procedural rule would have allowed the Board to "second guess" the Agency on the basis of information not available to the Agency at the time of permit issuance:

> "The intervenors attempt to distinguish a challenge to the allowance of a permit under Rule 503(a) and an appeal from the denial of a permit under section 40 on the grounds that the former is not a review but an enforcement proceeding at which additional evidence may be submitted. If the Rule 503(a) proceeding is not a review but a new determination of an applicant's entitlement to a permit, it is clearly an unauthorized assumption by the Board of authority to grant permits delegated by the Act to the Agency." 74 Ill. 2d at 448.

WMI accordingly urges the Board to retain its traditional approach to permit appeal cases.

The Board is not persuaded that, as a matter of law, precedent exists requiring application by the Board of the manifest weight standard of review; cases cited by the courts in the Section 39.2 cases do not concern Board review of Agency actions. As a matter of policy, the Board cannot embrace the manifest weight review standard in permit appeals. Landfill Inc. requires only that the Board refrain from purporting, in the guise of "review", to order issuance of a permit based on information which the Agency did not have in its possession and therefore could

not have considered. It does not preclude Board review of facts available to the Agency, and a Board determination concerning Agency application of such facts. WMI correctly pinpoints the major distinction between the procedures for local siting decisions; transcribed hearings and written findings of fact are required in the former instance, and are not in the latter. The problems of review in the latter situation, as identified by the Board in Oscar Mayer, remain.

In examining this issue, the Board has taken guidance from Kenneth Culp Davis' Administrative Law Treatise. While Mr. Davis too speaks of the scope of judicial review of administrative decisions, some of the philosophy applies equally well to consieration of the Board's review of Agency decisions.

Under the Act, the Agency is required to state its "reasons" for permit denial. Mr. Davis explains that "[r]easons differ from findings [of fact] in that reasons relate to law, policy, and discretion rather than to facts." Davis, Administrative Law Treatise, Section 16.12, p. 476 (1958). Under the Act, the Board is required to "state facts and reasons" for its decision in a written opinion [Section 33(a)]. As to findings of fact, Mr. Davis notes that "[t]he accepted ideal, as stated by the Supreme Court, is that 'the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.'" Id., Section 16.01, p. 435-436. Mr. Davis further observes that

> "the proportion of cases remanded for lack of adequate findings is much greater on judicial review of administrative action than it is on appellate court review of decisions of trial courts ***; the explanation for this greater proportion is simply that a reviewing court has greater freedom to make its own disposition of a case that has come up from a trial court but that the reviewing court often cannot make its own disposition of a case originating in an agency, without usurping power that the legislative body has placed in the agency and has withheld from the reviewing court." Id., Section 16.01, p. 437.

Thus, there are two sound policies for the Board to reject the manifest weight of the evidence standard. The first, as noted by the Board in Oscar Mayer, supra, p. 4, is that the Agency itself presents no findings of fact to the Board. The importance of this is demonstrated in this case. The completeness of the Agency record was established only at hearing after supplements by the Agency and WMI (Opinion p. 5). It is clear from the record that various items of information within the possession of the Agency were either not received or not considered by various

top-ranking Agency personnel e.g. evidence of compliance with a groundwater assessment plan (Opinion, p. 29), and five quarters sample results post-August, 1982 showing no contamination of Well G105 (Opinion p. 27). This is not all sinister or surprising, given the volume of paper flowing through the Agency, and the need of management to have information screened. Inadvertance can, however, have untoward or unjust results; were the Board to be restricted in the scope of its review, the Board could not reach the question of whether Agency "reasons" were grounded on consideration of less than all of the facts available to it.

The second reason for rejection of the manifest weight test is to allow the Board to establish a proper record for reviewing appellate courts containing the findings of fact and conclusions of law, including any quasi-legislative interpretations of its own rules, required by the Act. This results in judicial economy, preventing remands to the Board of defective Board records, based on inadequate Agency records, by courts fearful of "usurping power that the legislative body has placed in the [environmental agencies]."

What test, then, does the Board apply?

In 1958, Mr. Davis set forth some of the history of various appellate review standards:

> "The debate of the 1930's over scope of review was largely between those who wanted broad review or even de novo review and those who wanted narrow review or even no review; the extremists, however, moved from both ends toward the middle, and the substantial-evidence rule prevailed.***
> State statutes providing for de novo review are often interpreted to mean review under the substantial-evidence rule. (footnotes omitted)" Davis, Administrative Law Treatise, Section 29.01, p. 116 (1958).

In discussing the substantial evidence test in his 1982 Supplement, Mr. Davis observed that:

> "Probably no court and no one else disagrees with the statement in Section 29.01 of the 1958 Treatise that 'the main inquiry is whether on the record the agency could reasonably make the finding.' The test of reasonableness can be applied either to a factual finding or to a finding that is based on policy or judgment and not on evidence." Davis, Administrative Law Treatise, Section 29.00-1, p. 526 (1982 Supp.).

The Board, in its Oscar Mayer decision, has essentially articulated its application of a type of substantial evidence test, rather than a manifest weight of the evidence test. As noted in Oscar Mayer, "Agency interpretations of the Act and regulations . . . enjoy [no] presumption before the Board", supra, p. 4, because this involves quasi-legislative functions delegated to the Board, and not the Agency under the Act. While the Board considers policy reasons advanced by the Agency in support of determinations it has made, the Board reaches its own conclusions. As to factual matters, in Oscar Mayer the Board noted that Agency "reasons [are not] evidence of the truth of the material therein" (Ibid.). The Board considers the competent evidence submitted in the Agency's permit record as augmented by the hearing record concerning facts in the Agency's possession at the time of hearing. The Board then determines whether the Agency's decision to deny a permit or impose particular conditions is supported by substantial evidence that the applicant has not met his burden of proof under Sections 39(a) and 40 of the Act.

In this case, many of the Agency's permitting decisions do not involve factual findings, but instead were based on incorrect interpretations of the Act and Board rules: e.g. incorrect belief in Agency authority to issue compliance orders and to unilaterally modify permits (Opinion, p. 20, 21). Some Agency "factual findings" were not supported by any evidence other than opinion, e.g. lack of compliance with a groundwater assessment program (Opinion, p. 29-30), or were made on the basis of facts negated by subsequent facts e.g. initial sample results indicating presence of contaminants followed by five quarters of "clean" tests (Opinion p. 28-29). Based on this record, applying a substantial evidence test (or even a manifest weight of the evidence test), the Board cannot sustain the previously reversed Agency permitting decisions.

Finally, assuming that the Board may correctly take administrative notice of figures in the Governor's Budget Book, the Board finds the Agency's comparison of its $28 million budget to the Board's $888,000 budget as support for the Agency's argument that its reasons for permit denial should enjoy a presumption of validity to be disingenuous. The Agency is making an "apples and oranges" comparison of dissimilar functions; the Act charges the Agency with investigatory, enforcement, and permitting functions, and the Board with quasi-judicial/quasi-legislative functions in adjudication of cases and promulgation of rules.

Scope of Hearing and Witness Credibility

The Agency cites as error the failure to allow entry into the record of well test results obtained subsequent to the time of permit denial and limitation of the scope of the testimony of

Drs. Warner and Hyrhorczuk (Agency Motion to Reconsider, p. 15-16). For the Board to have done otherwise would have been to allow a blurring of the lines between an enforcement case and a permit appeal, in contravention of Landfill, Inc.

The Agency also argues that the Board has ignored findings of its Hearing Officer as to the credibility of various witnesses concerning agreement with groundwater monitoring permit conditions (Id., p. 12-13). A related argument is that if the Board is attempting to conduct a de novo inquiry,

> "it should do so by conducting proceedings in a traditional fact finding role of observing the witness testifying making its own credibility judgments, or at least, force the Board Hearing Officer to sit as a true fact finder and render a detailed Opinion as to the credibility of the witnesses and the weight of their testimony by his own observations. In fact, general comments submitted by the Hearing Officer on the credibility of the witnesses dictates a finding in favor of the Agency." (Id., p. 5.)

Section 40 hearings are to be conducted pursuant to the procedures of Section 32 and 33. Section 32 provides that hearings "shall be held before a qualified hearing officer, who may be attended by one member of the Board . . . " (contrast with Section 28, requiring attendance of one member of the Board in rulemaking hearings). En banc hearings before the Board, even if desirable from a party's point of view, are impractical from the point of view of having seven, equal "judges" conduct a hearing, as well as for reasons of budget and workload. The statute does not provide authority for the hearing officer to make substantive decisions, or draft findings of fact and conclusions of law. The Board's procedural 35 Ill. Adm. Code 103.203(d) does authorize and require the hearing officer to provide a statement as to the credibility of witnesses "based upon his legal judgment and experience . . . [indicating] whether he finds credibility to be at issue in the case and if so, the reasons why." The rule goes on to expressly state that no other statement is authorized.

A distinction must be drawn as between credibility based on demeanor, and credibility as it relates to the weight ultimately given to the facts and opinions offered by the witness. The detailed credibility statement filed by the hearing officer in this case generally finds no demeanor credibility issues with any witness. Some weight of the evidence concerns are listed in the statement as to witnesses testifying on behalf of the Agency, as well as WMI. This type of weight of the evidence credibility statement is not considered dispositive by the Board, but is viewed as an additional resource for crystallization of issues

before the Board. [Cf., Davis, Administrative Law Treatise, Section 29.01, p. 117 (1958) ("Both before and since the [federal] APA an agency has had power to substitute judgement for that of an examiner on all questions, even including credibility of witnesses observed by the [hearing] examiner and not by the agency." (Footnotes omitted).]

The Board continues to find that the question of WMI agreement to conditions is irrelevant to the conditions' legality. The Board finds no issue of personal credibility with any witness, and does not find that any of the professional consultants engaged to testify here have provided testimony based on a paycheck rather than professional opinion (cf. Garthus Brief). The weight given to the professional opinions of these witnesses as well as Agency and WMI personnel was based on the facts and legal interpretations on which those opinions were based.

Sampling Results

The Agency challenges the Board's holding that the sampling data relied upon by the Agency was insufficient to support denial of the Trench II operating permit. The Agency asserts that the Board improperly failed to consider May, 1983 sample results (Agency Motion to Reconsider, p. 12).

The Board's Opinion did not discuss the May, 1983 samples (Resp. Exh. 5), which the Agency had not initially asserted were the basis for its permit denial (R. 937). The results of these samples was a reading in G105 of 7 ppb trichloroethylene and 80 ppb dichloroethylene; in W105, 10 ppb benzene, 1 ppb tricholoethylene; in W106, a trace of benzene; in W107, 20 ppb benzene.

As to the benzene in the W wells, Mr. Hurley, head of the Agency's Springfield laboratory, testified that benzene is a "very sensitive component to detect" using a gas chromatograph mass spectrometer, the detection level varying from 1 ppb to 5 ppb (R. 1701-1702). These test results were not confirmed by retesting (see generally R. 1442-1452), and the record contains no subsequent samples showing the presence of organics in these wells.

As to G105 results, the May 07 ppb reading was not reconfirmed, and is considerably lower than the 18 ppb December, 1982 reading which was admitted to be the possible result of a laboratory error (see Opinion, p. 27)*. The 80 ppb dichloro-

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*The Board notes that Resp. Exh. 41, a summary sheet of contaminants found in the ESL also indicates a 19 ppb trichloroethylene reading in October 19, 1982, althought no laboratory sheets are included in the record. The results of this reading are negated by the five quarters of samples showing no contamination subsequent to January, 1983 (Opinion, p. 27).

ethylene reading was not reconfirmed. In addition, the results of the leachate analysis from the ESL disposal area indicates that this constituent is not present in the leachate at these levels (Pet. Exh. 15, p. 2a, 2b, 2c). In short, the May results alone or in combination with the other results previously discussed may not serve as the basis of this permit denial.

The Agency has also challenged the Board's right to find that initial sampling data suggesting presence of chemicals close to detection limits is not--standing alone--scientifically valid evidence of anything other than the need to perform additional testing (Agency Motion to Reconsider, P. 13-14). This is a determination as to the weight to be given such data which is well within the province of the Board's technical discretion. Additionally, the concepts of replication and repetition of test results (Opinion, p. 28-29) are embodied in Part 725 of the RCRA rules.

Site Geology

The Agency alleges that the Board's Opinion implies that all concerns of all Agency geologists were satisfied by issuance of the Woodward-Clyde reports (Agency Motion to Reconsider, p. 14). This is not the thrust of the Board's Opinion, p. 31-34. The Board has reviewed the entire body of the data available to the Agency. As previously noted, it is apparent not all persons testifying on behalf of the Agency did so, or were in a position to, do so. Considering the testimony and evidence as a whole, the Board continues to believe that there is substantial evidence confirming the site's inherent manageability, although the Board again emphasizes that this issue is not properly before it. (Opinion, p. 26-27, 31-34.)

Errata Correction

WMI and the intervenors' have brought several typographical errors to the attention of the Board, which will be corrected as noted in the following Order (WMI October 22, 1984 Brief p. 11, n. 5, Topolski Brief p. 2-3, Rourke Brief p. 1).

Summary

Upon reconsideration, the Board declines to modify the substantive holdings of its October 1, 1984 Opinion and Order (but see discussion of "Date for Permit Issuance," infra). The Board has made a review of this case, limited to the information before the Agency at the time of its permitting decision, consistent with the approach articulated in Oscar Meyer. However, applying even a manifest weight of the evidence standard, the Agency's previously stricken permitting decisions were contrary to legal precedent and unsupported by a proper interpretation of all facts in the record before the Agency.

MOTION TO STAY

The Agency has moved the Board to stay its Order pending appellate review. While the motion is somewhat premature, the Board will address it at this time in the interests of administrative economy. The Board notes that the Agency's motion is limited to the issuance of the Trench II operating permit and the 599 supplemental permits. The arguments are as follows:

Likelihood of Success on the Merits

The Agency argues that appellate reversal is likely because the Board has applied an improper evidentiary standard, has usurped the Agency's permitting authority, and has rendered an improper decision based on any evidentiary standard. WMI asserts that the Board has applied well established precedent concerning both the evidentiary standard to be employed, and the division of functions established by the Act between the Board and the Agency, and that the decision is justified using any evidentiary standard (WMI's November 16, 1984 Brief, p. 18-24).

Irreparable Harm to the Public and the Environment

The Agency's arguments are based on the assumption that the hazardous wastes disposed of in Trench II during the pendancy of this appeal will compound any existing problems at the site, and will themselves leak into the groundwater and contaminate the Des Plaines River.

WMI counters that this argument does not acknowledge the fact that the Agency has stipulated that the design and construction of Trench II are not at issue (R. 529). It further argues that it is unlikely that all of the following circumstances will occur: failure of mechanisms to prevent leachate formation, failure of the leachate collection system, breach of the synthetic liner, and breach of the recompacted clay liner.

Harm to WMI

The Agency asserts that postponement of operation of Trench II will not substantially harm WMI, as loss of revenues can be absorbed by the "world's largest hazardous waste company". Citing Waste Management of Illinois v. IPCB, supra, which affirmed denial of Section 39.2 approval for expansion of ESL, the Agency additionally claims that there is no need for waste disposal capability at the existing ESL site.

WMI charges that, in addition to the revenue losses resulting from the de facto shutdown of close to a year's duration, that the Agency's unlawful denial of it's property right to engage in waste disposal activities is itself a source of substantial harm, Martell v. Mauzy, 511 F. Supp. 729 (N.D. Ill. 1981).

The Board's Balance of Equities

The Board does not find there to be a reasonable likelihood of a successful Agency appeal of its decision for the reasons advanced by WMI, as well as the reasons expressed in this Supplemental Opinion. The Board finds that total failure of Trench 11 during the pendancy of any appeal while a possibility, is a very remote one. Reliance upon any of the need findings in the Waste Management ESL expansion case is misplaced, as those findings were predicated on continued disposal operations assuming continued issuance of operating permits for units within the site permitted for development in the early 1970's (Opinion, p. 7). As to the relative harm to parties, the Board finds that the equities lie with WMI, basing its analysis on the Martell case.

Martell involves a suit requesting injunctive relief ordering issuance of a landfill operating permit which the Agency had denied, without prior hearing, pursuant to Sectiion 39(e)(i) of the Act. The basis of the denial was nine instances of alleged, but not adjudicated, misconduct on the part of Steve Martell. The result of the denial was a shut down of the Paxton Landfill. The District Court ordered issuance of the permit pending completion of an adjudicatory hearing, applying the tests at issue here. While the financial consequences to Paxton were likely greater than those to WMI in the instant case, the logic of the Martell court's analysis is equally compelling as applied to the circumstances in this action.

> "The Agency plainly has a vital interest in ensuring the safe and proper operation of waste material facilities. Public health and safety concerns mandate the strict oversight of such facilities to guard against shoddy or dangerous conduct. Thus the Agency may properly require that disposal trenches meet technical criteria which minimize public risk. However, this interest is not well served by the Agency's acton here, since it is undisputed that trenches U, V, and W conform to the Agency's own technical and engineering specifications. On several occasions Agency personnel confirmed that the trenches had been properly constructed and defendants have never suggested otherwise. It is unquestioned that Agency concerns about the future operation of the trenches are legitimate. These concerns, however, can be met by the standard Agency practice of regular inspection and monitoring. Should violative conduct be detected, the Agency has ample enforcement powers to deal with the situation." 511 F. Supp. at 741-42.

The motion for stay is denied.

Date for Permit Issuance

In its Order of October 25, the Board stayed the effect, pending issuance of this Order, of its Order of October 1. That Order directed issuance of permits on November 15, 45 days after the date of the Order. WMI requests that the Agency be given 14 days to issue permits consistent with the October 1 Order, asserting that the Agency has long possessed the information needed to issue permits consistent with the Board's Opinion.

The original time schedule would have required Agency issuance of permits within 21 days of the date of the Board's Order upon reconsideration. The October 1, 1984 Order will be modified to reinstate that timetable. In the interests of clarity, the Board will modify its previous Order to reflect these new dates, and will restate the balance of its October 1 Order.

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

ORDER

A. The Board's Order of October 1, 1984 is modified upon reconsideration, and is restated with these modifications as follows:

1. The Agency's permitting decisons concerning Permit 1984-16-SP, issued March 2, 1984, are affirmed in part and reversed in part. The permit is remanded to the Agency. On or before December 17, 1984, the Agency shall issue a revised permit, striking Special Conditions 14, 16, 17, and Special Attachment B in their entirety, and amending Special Conditions 12 and 13 and Attachment A., Conditions 2, 3, 4, and 5 consistent with the October 1 Opinion, and the above Supplemental Opinion.

2. The Agency's April 20, 1984 denial of an operating permit for Trench 11, and its April 30, 1984 denial of about 599 supplemental wastestream authorization permits is reversed. The Agency shall issue these permits on or before December 17.

3. The September 10, 1984 motion to vacate the hearing officer's order granting intervention is granted.

4. Petitioner's various motions for default are denied.

B. The Board's Opinion of October 1, 1984 is modified as follows to correct errata:

1. On page 1, in paragraph 1, line 4, "Elwood" is to be substituted for "Elmood";

2. On page 3, in full paragraph 3, line 4, "Section 106.202(a)" is to be substituted for Section 103.202(a)";

3. On page 24, in full paragraph 3, line 4, "Attachment A" is to be substituted for "Attachment B".

4. On page 34, in full paragraph 1, line 11 "Mr. Hendron" is to be substituted for "Dr. Warner".

C. The Agency's October 12 motion for stay of this Order is denied.

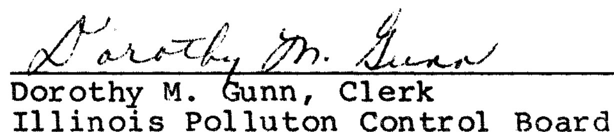
D. WMI's motions of October 22 and November 16 to strike various portions of the citizen's October briefs and the Agency's October 22 motions and November 5 brief are granted.

IT IS SO ORDERED.

J. D. Dumelle concurred.

B. Forcade dissented on Paragraph A(3) of the Order, and concurred in the balance of the Supplemental Opinion and Order.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Supplemental Opinion and Paragraphs A(1, 2, 4) and B, C, and D of the Order were adopted on the 26th day of November, 1984 by a vote of 6-0, and that Paragraph A(3) of the Order was adopted by a vote of 5-1.



Dorothy M. Gunn, Clerk
Illinois Polluton Control Board