

As to various requested modifications in the area near the proposed Cell M the Board voted against permitting container storage and tank storage. The Board also voted to deny permission for a container crushing operation but to allow certain other modifications.

The last category for consideration was whether or not a permit should be issued for the construction and operation of Cell M. The Board initially addressed potential modifications of the permit proposed in the report and recommendations of the adjudication panel. After discussion about and voting upon the potential modifications, the Board discussed the merits of the Cell M question. The Board recessed briefly to determine if additional conditions could be crafted which would address concerns of Dr. W.B. Clapham, Jr., a geologist member of the Board, as to whether the proposed Cell M would present a minimum risk of contamination of water and soil in the area. Dr. Clapham had not yet had the opportunity to review the full record of the adjudication hearing and had unresolved questions about whether a sand seam in the area was of such proportion that migration of liquid waste could occur. Apparently due in part to the time constraints of the meeting, sufficient new conditions could not be formulated to alleviate Dr. Clapham's concerns. As a result, the Board voted against issuing a permit for the construction and operation of Cell M.

The vote of the Board as to Cell M was not journalized immediately following the meeting of August 29, 1990. Instead, Dr. Clapham and staff members from the Board and the Ohio EPA apparently worked together to see if additional

conditions could be crafted which would allow the construction and operation of Cell M with minimum risk of contamination to the soil and water in the area.

On December 20, 1990, the Board met again, at which time Dr. Clapham orally presented a motion that the Board reconsider its earlier vote and permit the construction of Cell M subject to certain additional conditions including the removal of all sand in the immediate area of Cell M and replacement of the sand with recompact clay. In the interim, Envirosafe had filed a motion, requesting reconsideration, but that motion was expressly tabled in lieu of which the Board addressed Dr. Clapham's motion for reconsideration.

The parties were permitted to present additional evidentiary material and written arguments to the Board, but no additional evidentiary hearings were conducted. Ultimately, the Board voted in favor of issuing a permit for the construction and operation of Cell M. The permit runs some one hundred thirty-three pages in length as a result of numerous conditions and requirements included therein.

The latter vote was journalized and the city of Oregon has appealed, assigning four errors for our consideration:

"I. The Ohio Hazardous Waste Facility Board's reconsideration of its August 29, 1990 decision was contrary to law.

"II. The Ohio Hazardous Waste Facility Board's failure to journalize its decision resulted in a denial of Oregon's due process of law.

"III. It was reversible error by the Hazardous Waste Facility Board to find that [Envirosafe] represents

minimum risk in the contamination of ground and surface waters and in soil contamination as set forth by O.R.C. 3734.05.

"IV. The [Hazardous Waste Facility Board] erred when it delegated its authority to [the Ohio EPA] by special terms and conditions."

Such additional facts as are deemed pertinent are set forth under the respective assignments of error.

The first assignment of error attacks the legality of the Board's decision to reconsider its vote of August 29, 1989 and to revisit the issue of whether Cell M should be constructed.

R.C. 3734.05 requires:

"***

"In rendering a decision upon an application for a hazardous waste facility installation and operation permit, the board shall issue a written order and opinion, which shall include the specific findings of fact and conclusions of law which support the board's approval or disapproval of the application. *"**

This code section is reinforced by Ohio Adm Code 3734-1-52(B), which reads:

"(B) In rendering a decision, the board shall issue a written final order and opinion, which shall include the specific findings of fact and conclusions of law which support such decision.

"(1) The final order and opinion of the board shall be based solely. on the record of the proceedings.

"(2) The final order and opinion of the board may adopt, in whole or in part, the report of the hearing examiner.

"(3) When the final **order and opinion of the board disapproves or modifies the report of the hearing examiner, such final order and opinion shall include the reasons for such disapproval or modification.**"

Clear from R.C. 3734.05 and Ohio Adm Code 3734-1-52(B) is the fact that no decision of the Board is final until such time as the Board has reduced it to appropriate written form and journalized it. Appellant has cited us to no binding Ohio cases which indicate that an administrative agency cannot reconsider its decisions before making them final. In fact, the applicable rulings of the Supreme Court of Ohio indicate the contrary. Thus, in Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co. (1986), 28 Ohio St. 3d 20, the Supreme Court held in paragraph three of the syllabus:

"Generally, administrative agencies have inherent authority to reconsider their own decisions since the power to decide in the first instance carries with it the power to reconsider. The agencies retain jurisdiction to set aside or otherwise reconsider their decisions until the actual institution of a court appeal or until expiration of the time for appeal, in the absence of specific statutory limitation to the contrary. ***" (Citations omitted.)

This holding was expressly quoted and followed subsequently in Bispeck v. Bd. of Comms. of Trumbull Cty. (1988), 37 Ohio St. 3d 26, at 32.

Appellant has also submitted that the Board had a duty to journalize its vote of August 29, 1990, even though the members of the Board apparently had misgivings about their vote shortly thereafter and ultimately decided that a permit for Cell M could be granted if additional conditions were met. We do not find that an administrative agency has a duty to journalize a decision which it

determines to be erroneous or which, on further investigation conducted during a reasonable period of time, it believes to be in need of reconsideration.

Appellant has suggested that the time which elapsed here was unreasonable, but we cannot agree. Given the complexity of the issues and the sheer volume of material to be reviewed, a delay of less than four months between the initial vote and the decision to reconsider was not unreasonable.

The first assignment of error is overruled.

The second assignment of error suggests that the city of Oregon was deprived of due process of law because the Board did not journalize its vote of August 29, 1990. Due process normally requires notice of the issues to be addressed and an opportunity to be heard. Contrary to appellant's suggestion, adequate due process was available here. All concerned were heard and heard repeatedly on the core issue, namely whether Envirosafe could construct and operate Cell M in such a way as to present a minimum of risk to the environment. Due process does not require an administrative agency to journalize an erroneous or arguably erroneous decision so the beneficiary of the error can have the additional benefits which accompany being the appellee on appeal.

The second assignment of error is overruled.

The third assignment of error addresses the key issue, namely whether or not Envirosafe can construct and operate Cell M in such a way as to present a minimum risk of contamination to the environment.

R. C. 3734.05(D)(6) requires:

"The board shall not approve an application for a hazardous waste facility installation and operation permit unless it finds and determines as follows:

"(a) The nature and volume of the waste to be treated, stored, or disposed of at the facility;

"(b) That the facility complies with the director's hazardous waste standards adopted pursuant to section 3734.12 of the Revised Code;

"(c) That the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of various alternatives, and other pertinent considerations;

"(d) That the facility represents the minimum risk of all of the following:

"(i) Contamination of ground and surface waters;

"(ii) Fires or explosions from treatment, storage, or disposal methods;

"(iii) Accident during transportation of hazardous waste to the facility;

"(iv) Impact on the public health and safety;

"(v) Air pollution;

"(vi) Soil contamination.

"(e) That the facility will comply with Chapters 3704., 3734., and 6111. of the Revised Code and all rules and standards adopted under those chapters *."**

The Court of Appeals for the Tenth Judicial District, Franklin County, Ohio is obligated by statute to review decisions of the Board in situations such as here presented. But, our review is not unlimited. We are expressly told in R.C. 3734.05(D)(7):

"* The court shall affirm the order complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the' order is supported by reliable, probative, and substantial evidence and is in accordance with law. ***"**

We are not asked to determine what we would do if we were the original trier of fact or if we were the Board ourselves. We are told to affirm the Board's decision if the requisite evidence was before the Board and the Board's decision was lawful. Given the fact that such evidence is abundantly present in the sixteen thousand pages of record before us, we must and do affirm the Board's decision.

Appellant sets forth specific factual determinations by the Board which it suggests are erroneous. First, appellant attacks certain of the expert testimony as to the lacustrine layer of the soil. However, appellant must acknowledge that such expert testimony is present in the record in abundant detail. Further, the lacustrine layer is ordered to be removed as a part of the construction of Cell M and multiple layers of clay and other impermeable liners installed. So, the characterization of the lacustrine layer has little or no relationship to the ultimate issue of the risk of environmental contamination.

Second, appellant attacks part of the expert testimony as to the upper till which apparently consists of thirty to fifty feet of unweathered clay. Appellant submits that the clay contains fractures or joints which would permit liquid waste to leak through what is otherwise an extremely impermeable layer. The adjudication panel and the Board considered the conflicting points of view

of the experts on this issue and resolved the credibility in favor of those experts who spent significant time on the site for the construction of Cell M R. C. 3734, 05(D)(7) does not contemplate that we will re-do such credibility determinations, but only look at the evidence as a whole and seek the presence or absence of "reliable, probative and substantial evidence."

Similar observations can be made as to the underlying lower till and bedrock. Conflicting opinions were presented and the Board accepted the findings of the adjudication panel in favor of the opinions of some of the geological experts as opposed to the experts called to testify on behalf of the city of Oregon. The requisite quantum of proof was presented.

Finally, appellant attacks the fact that the Oregon Fire Department is not ordered to be primarily responsible in some way for Cell M and opines that this somehow increases the risks of environmental contamination. Appellant appropriately devotes little of its brief to this position. Given the fact that the Board has no authority to order the Oregon Fire Department to assume primary responsibility for fire-related services at the Envirosafe facility, the Board did not do so. The permit as drafted clearly contemplates that the Oregon Fire Department will be consulted and asked to assist, but the Board could not and should not condition the construction and operation of a hazardous waste facility such as Cell M upon the wishes and desires of the local fire department.

Since the record contains reliable, probative and substantial testimony that Cell M can be constructed and operated with minimal risk to the