

Board's Final Order will allow for this opportunity and will not prejudice any party. It will also prevent the unnecessary intrusion of the Court of Appeals in this Board matter. Therefore, Southdown respectfully requires that its Motion for Reconsideration be granted and that the Board immediately issue an order suspending its September 19, 1994 **Final** Order.

III. LAW AND ARGUMENT

A. The Board Has Failed To Include In Its Final Order **Any** Reasons For Its Disapproval Of The Hearing Panel's **Report** and Recommendation In Violation Of OAC 3734-1-52.

Pursuant to OAC 3734-1-52(B)(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. (Emphasis added.)

This **affirmative** duty was recognized by the Ohio Supreme Court in West Virginia v. Ohio Hazardous Waste Facility Approval Board, 28 Ohio St. 3d 83 (1986) wherein the court noted that “[w]e find that the board has completely **fulfilled** its duty to state its reasons in those instances where it disapproved or modified the hearing examiner’s recommendations”. Id. at 87.

In the instant case, the Board has failed to **include any specific** reason why the Adjudication Panel’s Report and Recommendation recommending that Southdown be issued a permit has been disapproved. The Adjudication Panel conducted an extensive eight-day adjudication hearing, reviewed hundreds of pages of documents, examined numerous witnesses, and viewed cross-examination of witnesses. Based on this knowledge, the Adjudication Panel concluded that Southdown had demonstrated that it satisfied each and every siting criteria in ORC

§3734.05(D)(6) and recommended that Southdown be issued a permit.” The Board, however, has disapproved this recommendation without comment. This failure to **specifically** address the Adjudication Panel’s Report and Recommendation in the Final Order is a clear violation of OAC 3734-1-52(B)(3) and requires that the Board reconsider its Final Order.

B. The Board Unlawfully Considered Information Outside the Record.

On March 26, 1993, the record in this proceeding **officially** closed as evidenced by the Adjudication Panel’s Entry Closing the Record (CD 1.99) and the Board’s Public Notice of Advertisement/Closing of Record (CD 2.00). Pursuant to the Board’s rules, “the record **shall** be the exclusive basis for the decision by the [B]oard” (emphasis added). OAC 3734-1-50(B); see also OAC 3734-1-52(B)(1) (“the **final** order and opinion of the board shall be based solely on the record of the proceedings”). Therefore, in reaching its decision the Board is restricted to the record as it existed on March 26, 1993.

The Board’s rules, however, do provide three (3) explicit ways in which the record may be supplemented after an adjudication panel issues its report and recommendation, which in this case was on June 30, 1993. Pursuant to OAC 3734-1-50(B), after the filing of the report of the hearing examiner:

1. the Board may on its own motion or on motion of a party permit the introduction of further documentary evidence;
2. the Board may, after granting to an opposing party the opportunity for preparation, take additional testimony; or
3. the Board may remand the matter back to the hearing examiner for the taking of additional testimony.

In this case, the Board did not **lawfully** supplement the record to incorporate the questions and responses regarding the risk **assessment** study despite advice **from** the Ohio Attorney General's Office that its action was not in compliance with **rules** governing Board proceedings. In a March 9, 1994, letter to the Board's Chief Legal Counsel and the Chief Technical Advisor of the Board, the Ohio Attorney General's office advised that consideration of materials and evidence outside the record, including questions and responses regarding the risk assessment study, without following the appropriate procedures set forth in OAC 3734-1-50(B) for supplementing the record before the Board, could result in invalidation of the Board's decision as not in accordance with the **law**.¹⁹

The Attorney General's Office reiterated this position in its Motion to Introduce Documentary Evidence, dated March 21, 1994. While the Attorney General's Office, on behalf of the Ohio EPA **staff**, moved the Board to supplement the record with information regarding the risk assessment, the Board denied this **motion**.²⁰ Moreover, the Board never moved on its own to supplement the record with this information as provided for in the rules. Therefore, the risk assessment questions and responses and Mr. Brown's presentation were never made part of the record, and the Board's consideration of this information in deciding upon Southdown's permit application was in violation of the Board's own rules, namely OAC 3734-1-50(B) and 3734-1-

¹⁹ **See Correspondence from** John K. McManus and Paul Jesse, Assistant Attorneys **General**, to Michael A. Shapiro and Robert E. Brown, HWFB, dated March 9, 1994, **copy** of which is attached hereto as **Exhibit D**.

²⁰ **See** Final Order, p. 70.

52(B)(I). In order to remedy this violation, the Board must reconsider Southdown's application and afford Southdown the opportunity to respond to this issue in accordance with the Board's rules.

In its Final Order, the Board attempts to justify its consideration of the risk assessment information on the basis that there is a distinction between the "hearing record" and the "record of proceedings."²¹ The Board, however, cites no authority or basis for this distinction, nor can it because its own rules do not make such distinction. The concept of a "hearing record" is not provided for in the Board's rules. In OAC 3734-1-50, which is captioned "Record of Proceedings" (emphasis added), the Board's rule states that:

The record shall be the exclusive basis for decision by the board. After the filing of the report of the hearing examiner, the board, upon its own motion or the motion of a party, may permit the parties to introduce further documentary evidence, or, after granting an opportunity to any opposing party for preparation, may take additional testimony or remand the matter to the hearing examiner for the taking of additional testimony. (Emphasis added.)

It is, therefore, clear that the record of proceedings closes **after** the **filing** of the report of the hearing examiner. Once this occurs, the Board may not expand the record of proceedings unless it follows the procedures set forth in OAC 3734-1-50(B). In this case, the Board did not follow such procedures, as pointed out by the Ohio Attorney General's Office.

²¹ According to the Board, "the **portion** of the **record** that closed on March 26, 1993, as indicated by the hearing **examiner**, was the **hearing record**, i.e., the **record** pertaining to the adjudication **hearing**, as formulated by the parties. **After that date** the **record** of **proceedings**, of course, **remained** opened to **accept** for Board review and consideration, the report and recommendation of the adjudication **panel**, objections **by** the parties, oral argument at the Board meeting, Board deliberation, **Opinion and Final Order**, etc." See Final Order, p. 59.

Moreover, the language used in the Board's "Advertisement/Closing of Record" (CD 3.00) supports Southdown's interpretation of OAC 3734-1-50(B). The Advertisement/Closing of Record provided, in pertinent parts, as follows:

NOTICE IS HEREBY GIVEN THAT: On March 26, 1993, an Entry Closing the Record was issued in Southdown, Inc., Case No. 91-NF-0700. The adjudication panel's report and recommendation is due July 6, 1993. Parties' objections to the report and recommendation are to be filed within **20** days after receipt of the report and recommendation.

* * *

The application will then be deliberated by the Board for final decision.

The clear import of the foregoing is that once the report and recommendation is **filed** and the parties submit objections, the Board will take final action on Southdown's application, i.e., the record of proceedings has closed and the Board will base its decision on said record as required by OAC 3734-1-50(B).

As a result of the foregoing, the Board has exceeded its authority by considering information outside the record, and to remedy this situation the Board must grant Southdown's Motion for Reconsideration so that the record of proceedings can be reopened to include the material now outside the record.

C. The Board **Erroneously** Based Its Decision On **Information Not Relevant To The Siting Criteria**.

The Board's obligation in reviewing and **deciding** upon a hazardous waste facility permit application is to determine whether the facility and applicant meet the siting criteria set forth in Ohio Rev. Code §3734.05(D)(6). The Board may not expand this statutorily designated charge.

In the Matter of IT Corp., 61 Ohio App. 3d 470, 479-80 (1989) (Board may not review factors outside the statutory siting criteria); West Virginia v. Hazardous Waste Facility Approval Board, 28 Ohio St. 3d 83, 85 (1986) (the Board is under no statutory obligation to consider site alternatives). The Franklin County Court of Appeals has expressly held that factors outside the statutory siting criteria are not within the Board's prerogative in reviewing a permit application. In the Matter of IT Corn., 61 Ohio App. 3d at 479-80 (the fact that the applicant filed for reorganization under Chapter 11 of the United States Bankruptcy Code was not a proper consideration of the Board in the issuance of a permit pursuant to Ohio Rev. Code § 3734.05). Additionally, the Chairman of the Board at the March 23, 1994 meeting reiterated this restriction:

CHAIRMAN IOANNIDES: Mr. Lim, I appreciate your answer. You did give me a specific answer. But, first of all, it is not the intention of this Board to create new standards. That is not a function of this Board.

* * *

Now, we do not create new standards. We do not request new standards. I just want to clarify that. (Emphasis added.)

See Transcript of March 23, 1994 HWFB Meeting, pp. 41-42.

In the instant proceeding, isolated calculations used in Southdown's risk assessment are not matters of proper consideration for the Board. The calculations questioned by Mr. Brown and Dr. Pinto are almost exclusively contained in only one small portion of Southdown's risk assessment, i.e., the fire and explosion worst-case scenario.²² The fire/explosion scenario risk

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See Appendix I to Southdown's Written Responses to Questions from tk Public Hearings (CD .97).

assessment, however, is neither relevant to any siting criteria nor required by any siting criteria.

The only arguably relevant criterion is the need to demonstrate a minimum risk of fires and explosions. See Ohio Rev. Code §3734.05(D)(6)(d)(ii). This criterion requires a showing of minimum risk of fires and explosions which was more than adequately demonstrated by

Southdown throughout this **proceeding**, as determined by the Adjudication **Panel**.²³ For example, Southdown's proposed tank system will be equipped **with** the following:

1. foam fire suppression system which will utilize alcohol resistant foam to avoid being broken down by polar solvents which may be present in hazardous waste fuel;
2. a foam fire suppression system designed to apply foam to the area for twenty (20) minutes even though a fifteen (15) minute application time is adequate for the area;
3. flame arresters;
4. static grounding/bonding devices;
5. nitrogen blanketing system to further protect against the possibility of fire and explosion; and
6. lightning arresters to intercept and ground electricity from lightning which may strike the area"

Additionally, Southdown's waste acceptance procedures include a compatibility screening test and a reactivity test to ensure that spontaneous reactions do not **occur**,²⁵ and Southdown is

²³ See Adjudication Panel's **Report and Recommendation, Conclusions** of Law No. 12(i), dated June 30, 1993, p. 240.

²⁴ Id. Findings of Fact Nos. 56-61, p. 225.

²⁵ Id. Findings of Fact Nos. 77, p. 228.

prohibited from accepting **hydrophoric**, pyrophoric, and shock-sensitive materials and **Class A** explosives, among other **things**.²⁶ Finally, all personnel associated with the handling of hazardous waste fuels receive proper training to minimize the potential for accidents, and inspections of all aspects of the facility, including emergency equipment, are conducted on a periodic **basis**.²⁷ These items show that Southdown's facility demonstrates a minimum risk of **fires** and explosions **as** required by the statute.

On the other hand, the **fire/explosion** scenario risk assessment is totally irrelevant to this criterion and focuses instead on what may happen in a worst-case scenario if these safeguards **fail**. The risk assessment does not evaluate the chances of a fire or explosion given these safeguards, nor was it designed to make such a showing but rather shows the worst-case impact from a fire and explosion notwithstanding these safeguards. The applicable siting criterion, moreover, does not require a showing of the effect of a **fire** or explosion but rather a demonstration that the **fire** and explosion will not happen in the first place. Therefore, questions such as how high the flame will be or how hot the fire **will** be are irrelevant to the siting criteria and outside this Board's authority to review in conjunction with its permitting decision. As a result, the Board's decision to deny Southdown's permit application on the basis of alleged inaccuracies within the risk assessment must be reconsidered because of the Board's **unlawful** consideration of matters **irrelevant** to the siting criteria.

²⁶ Id. Findings of Fact No. 78, p. 228.

²⁷ Id. Findings of Fact Nos. 88 and 93, pp. 230-231.