ILLINOIS POLLUTION CONTROL BOARD
August 15, 1985

M.I.G. INVESTMENTS, INC., and UNITED BANK OF ILLINOIS, Petitioners,	)	
v.	)	PCB 85-60
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

DISSENTING OPINION (by J. Theodore Meyer):

I dissent from the majority opinion adopted in this matter by my fellow Board Members. A brief history of the law concerning local approval of landfill siting decisions is in order. Prior to the enactment of Section 39(c) of the Illinois Environmental Protection Act, (Ill. Rev. Stat. 1985, ch. 111½, par. 1039(c)), the landfill siting approval process in Illinois was in a complete state of disarray. In 1976, the Illinois Supreme Court decided that by enacting the Environmental Protection Act ("Act"), the state had pre-empted local government from using its zoning authority to prevent the siting of landfills within its boundaries. Carlson v. Village of Worth, 62 Ill.2d 406, 343 N.E.2d 493 (1976). Local government was up in arms over its ouster from the siting process. In a subsequent decision the court found that home rule units did retain power to regulate the siting of landfills. County of Cook v. John Sexton Contractors Co., 75 Ill.2nd 494, 389 N.E.2d 553 (1979). This created a schism: while home rule units could continue to prohibit landfills within their boundaries, non-home rule units were required to accept the siting decisions of the Illinois Environmental Protection Agency ("Agency") without opportunity for any local input.

In response, the Illinois General Assembly enacted Section 39(c) of the Act in order to give all localities some input into siting decisions. Essentially, Section 39(c) granted a portion of the state's power over siting decisions to local units of government by permitting them to review the site suitability of a "new regional pollution control facility" based on six criteria delineated in Section 39.2. These six criteria were to apply state-wide and were to be the sole criteria used by local government in judging the merits of a location. In today's decision, the Board majority has erroneously found that a change in the final contours of a sanitary landfill constitutes a "new" regional pollution control facility necessitating a local siting hearing under Section 39.2.

The majority arrives at this determination by deferring to the Antioch decision and by citing the need for administrative stability and convenience. Additionally, the majority reasons that its holding is "highly compatable [sic] with Section 39.2 criteria". Op. at 8. The majority then reviews the six criteria and infers that the legislature must have intended to include vertical expansion in the siting process because "[n]ot only can these factors be impacted by vertical expansion, but such expansion could potentially have much greater impact than areal expansion; an increase of volume by vertical expansion could well have more effect than areal expansion by one acre". Id.

As a member of the General Assembly and Chairman of the House Energy and Environmental Committee during enactment of this legislation, I must refute this contention. The majority's reference to "expansion by one acre" is taken from a remark made by me as sponsor of the motion to adopt the governor's amendatory veto. The majority mistakenly relies upon this remark to demonstrate that the legislature intended Section 39(c) to apply to vertical expansions, when in fact it was my and the legislature's intent and understanding that the area of expansion beyond the boundary refers only to surface area and not volume. Thus, only those expansions that would alter the physical boundaries as determined by the parcel's legal description were intended to be encompassed. I believe this legislative intent is clearly conveyed by the use of the words "area" and "boundary". To assert that changes in volume were to be encompassed by these two terms is to defy common English usage.

Moreover, the majority has ignored the fundamental distinction between what concerns were to be addressed by localities and what was intended to be reserved to the State. Strong policy reasons require that approval or disapproval of vertical expansions be the exclusive province of the Agency. This Board has consistently held that local authorities do not have the power to consider technical aspects of landfill design. See Waste Management v. County Board of Will County, 52 PCB 23 (April 7, 1983); Browning Ferris Industries v. Lake County Board of Supervisors, 50 PBC 61 (December 2, 1982) Waste Management of Illinois v. Tazewell County, 47 PCB 485 (August 5, 1982). Technical matters of design are beyond local government's expertise and require sole state jurisdiction to assure adequate and consistent state-wide standards. Questions of engineering design such as the height, depth, and volume of a landfill clearly constitute such technical aspects dedicated solely to Agency expertise. Although the majority assures us that its finding does not require that the Section 39.2 procedures be utilized for "every proposal to alter the contours of a landfill", no adequate definition is given for what changes in shape will trigger the approval process. Op. at 8. There are multitude of situations in which additional or different space may be occupied above or below the ground surface and thus, qualify as "vertical expansion": berms, trenches, elevation countours, buildings and equipment. To allow counties and

municipalities the power to co-regulate in this area "is to assure chaos". Browning Ferris Industries, supra at 70.

I also question the majority's wisdom in following the Antioch decision despite their conclusion that we are not bound by it; nevertheless, the majority has determined that Antioch and Agency acquiescence in Antioch's outcome dictate that this "area of law is now settled". Op. at 8.

I disagree. First, I believe the Board should not surrender jurisdiction over an important environmental matter such as this to a court of co-equal jurisdiction when we are under no obligation to do so. Second, I question the wisdom of abiding by an unreported decision which was issued without opinion and find it somewhat startling that a one-page order could settle an entire area of law. Finally, the majority itself has provided persuasive argument for rejecting Antioch in this quote from the Illinois Supreme Court: "[W]here it is clear that the court has made a mistake, it will not decline to correct it, although it may have been reasserted and acquiesced in for a long number of years . . . ." Op. at 6 (quoting Marathon Petroleum v. Briceland, 75 Ill. App. 3d 189, 394 N.E.2d 44 (1979) (quoting Neff v. George, 364 Ill. 306, 4 N.E.2d 388 (1936)).

Finally, without reiterating the arguments made before the Antioch court, I wish to endorse the position as then articulated by the Agency and the Attorney General as fully supported by sound logic and case law. See Pet. Brief at 3.

Thus, for the foregoing reasons, I dissent.

J. Theodore Meyer
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was filed on the 14th day of November, 1985.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board