ILLINOIS POLLUTION CONTROL BOARD
November 26, 1984

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

SUPPLEMENTAL OPINION, CONCURRING IN PART, DISSENTING IN PART (by B. Forcade):

I must dissent, in part, from the Board's Supplemental Opinion and Order, which affirms on reconsideration the denial of citizen intervention. I originally explained my position on this issue in my concurring and dissenting opinion of October 1, 1984. Briefly stated, while I am concerned about the potential impact that Landfill, Inc. has on the procedural rules concerning citizen intervention, I believe it is improper for the Board to invalidate these rules and deny intervention rights without going through a proper rulemaking procedure or without specific direction from a higher court. Landfill, Inc. is almost six years old. If our rules are invalid they should have been changed long before this issue arose. As Chairman Dumelle has pointed out in his concurring statement, there are compelling reasons to allow intervention, not the least of which is the strong tradition in Illinois of liberal public participation rights in the environmental area. Today, we once again deny intervention rights that I believe our procedural regulations establish. I, therefore, must dissent from paragraph A(3) of today's order.

While I am in agreement with the balance of the Board's Order and the general outcome that is achieved, I must concur with the supplemental opinion adopted by the majority. Specifically, I have concerns regarding the majority's analysis of the nature of Board review in a permit appeal and the application of the standard of review to the facts of this case. I also wish to explain my reasons for supporting today's order (except regarding denial of intervention), as it differs from the majority's rationale.

Illinois has a unique administrative system in the area of environmental regulation and control because of the division of functions between the Illinois Environmental Protection Agency ("Agency") and the Board. This system creates especially vexing problems in the context of Board review of permit decisions. Oscar Mayer and the line of cases that adopt that approach provide some guidance for the Board on the proper scope of review in a permit appeal, but Illinois law is silent on what the proper standard of review is in these cases.

Under Oscar Mayer the Board reviews the "record before the Agency at the time the decision was made." Frequently that record consists of substantial quantities of technical reports, correspondence and analytical data. One purpose of the Board's hearing is to allow the parties the opportunity to emphasize those portions of the record most favorable to their position in an organized manner. Although the scope of review is easily articulated, it leads the Board into substantial difficulty in determining what statements by witnesses at hearing were "before the Agency," and which were not. These problems are not unique to Illinois law. Professor Davis has criticized the "informal record before the decisionmaker" concept as unmanageable and unrealistic, Administrative Law of the Seventies, §29.01-8 Kenneth Culp Davis (1976). The voluminous record developed in the present case and the numerous evidentiary disputes that arose illustrate problems inherent in this approach.

While I support the majority's conclusion that the appropriate standard of review for Agency factual determinations is substantial evidence, I would follow the Illinois Supreme Court's articulation of that standard in Menning v. Department of Registration and Education, 14 Ill. 2d 553, 153 N.E. 2d 52 (1958). There, the court deemed the findings of an administrative agency prima facie true and correct. The court stated that reviewing courts were not authorized to reweigh evidence or to make independent determinations of facts. However, agency decisions must be supported by competent and substantial evidence. The majority has neglected to deem the Agency's findings of fact prima facie true and correct. I believe that Menning, Landfill, Inc., and §39 of the Act, provide a sound basis for this deference to Agency fact finding in the permit area.

Likewise, I agree with the majority that the Board need not defer to the Agency's conclusions of law. Interpretations of the Act and Board regulations are a proper function of the Board.

When these theories are applied to the factual evidence regarding the Trench II permit denial, I reach the same conclusion as the majority.

At pages 29-31 of the October 1, 1984 majority opinion, the evidence on implementation of the groundwater assessment plan and groundwater monitoring is reviewed. I support the majority opinion that the unanimous evidence shows the assessment plan was being implemented and that none of the assessment plan reports or groundwater quality monitoring analyses were overdue at the time the Agency permit decision was made.

The difficult aspect of the decision is that portion of the permit denial based on the "presence, or potential presence of hazardous waste constituents, in the groundwater." This relied primarily on the results of groundwater quality monitoring at the facility. On this issue, I depart from the majority reasoning as

expressed at pages 27-29 of the October 1, Opinion and pages 12-13 of the November 26, Opinion. There, I believe the majority does a de novo review of the groundwater quality evidence and draws a conclusion contrary to the Agency; the majority finds the testing results invalid.

I believe the Agency's factual determinations should be given deference, and any logical inferences thereof. I believe there was substantial evidence that the groundwater quality monitoring data was correct. The logical implication that may be drawn from this data is that ten older hazardous waste cells, without synthetic liners and with unknown clay compaction or presence of fractures, may after nearly a decade lead to the intermittent presence of trace or part per billion concentrations of contaminants in the groundwater.

Unfortunately, the laws of physics dictate that all hazardous waste cells will ultimately leak. Absent special circumstances, such as a major source aquifer or undermining, governmental decision-making must be based on determinations of when and how much leakage will occur and whether that amount is manageable, not on whether leakage will occur at all. I am unwilling to conclude that trace concentration leakage from adjacent cells, with unknown engineering, constitutes substantial evidence that Trench II, with "state-of-the-art" engineering, will leak unreasonably soon or excessively when the permeability tests are to the contrary.

I would note that landfill permitting decisions are, by necessity, predictive of future events. If those predictions prove incorrect and leakage does occur, enforcement actions can be filed with this Board against any landfill seeking remedial action to contain contamination and prevent harm.

Bill S. Forcade
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Supplemental Opinion, Concurring in Part and Dissenting in Part was submitted on the 4th day of December, 1984.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board