

ILLINOIS POLLUTION CONTROL BOARD
July 22, 1976

ENVIRONMENTAL PROTECTION AGENCY,)
)
 Complainant,)
)
 v.) PCB 75-477
)
 MASTER PATTERN, INC.,)
 an Illinois corporation,)
)
 Respondent.)

DISSENTING OPINION (by Mr. Zeitlin):

I respectfully dissent from the Board's Order of today on the Environmental Protection Agency's Motion for Reconsideration. The Board's Order is, I feel, deficient in several respects.

This Order undoubtedly constitutes adjudicative rule-making, beyond the Board's statutory authority.

1. Rule 202(b)(1) of Chapter 7: Solid Waste, requires an operating permit for any existing "solid waste management site."
2. Rule 104(u) defines Solid Waste Management as, "the process of storage, processing or disposal of solid wastes, not including hauling or transport..."
3. Rule 104(s) defines solid waste as "refuse."
4. Refuse, in turn, is defined in Rule 104(o) as "garbage or other discarded materials."

It is clear that the broken concrete used as fill in Respondent's site falls within the category of "other discarded materials." By distinguishing that concrete from other types or categories of "other discarded materials," the Board has used an adjudicative forum to amend the definition in Rule 104(o) to exclude that concrete. This it cannot do.

Nor do I feel that the end use of the concrete in question is material. The Board has previously stated that conversion to beneficial use is not material in determining whether a site is a "landfill." EPA v. Dill, PCB 71-42, 2 PCB 277, 279 (1971). Nor is it material whether a site is being operated for profit. EPA v. Rafacz Landscaping, PCB 72-196, 6 PCB 31 (1972).

It seems that the Board's decision here improperly expands the permit exemption in Section 21(e) of the Act. That section provides an exemption from the permit requirement for materials internally generated; here the Board has expanded this exemption to include materials from other sources, if only the "outside" materials are:

1. relatively a small proportion of the total material to be disposed of; and,
2. properly incorporated into the internally generated refuse.

Section 21(e) does not speak of an exemption for relatively small amounts of "outside refuse. Nor do either the Act or our Rules make an exemption based on the fact of proper operation of the site.

The Board's Order of today seems to contradict its earlier Opinion accompanying the adoption of Chapter 7. In the Matter of Solid Waste Rules and Regulations, R 72-5, 8 PCB 695 (July 31, 1973). The Board's Opinion there discussed, almost exclusively, the permit requirements of Chapter 7; very little discussion concerned the operating requirements. It has consistently been the Board's position that the permit system is necessary to assure proper operation and prevent environmental harm. Here, however, the Board has somehow arrived at the reverse conclusion: No permit is necessary when the operation of the site is correct. When the Board says that no permit is needed if, "there are no interstices to harbor rodents...or to serve as an aquifer transmitting leachate...if the material is in such location that the aesthetic value...is not unreasonably degraded then there is minimum potential for environmental harm," it almost defines the purposes of a permit system. The relationship of this type of analysis to the definition of "refuse" is not clear.

This case points out the fact that there may be a need to amend portions of Chapter 7. I do not dispute this need and would welcome an appropriate Regulatory Proposal on the subject. However, the Board should answer any such need within the procedural guidelines provided in the Act: a Regulatory change.


Philip Zeitlin
Member of the Board

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Dissenting Opinion was filed on the 26th day of July, 1976.


Christan L. Moffett, Clerk
Illinois Pollution Control Board