ILLINOIS POLLUTION CONTROL BOARD
September 26, 1972

ENVIRONMENTAL PROTECTION AGENCY	)	
	)	
	)	
v.	)	PCB 71-243
	)	
	)	
HARRY A. CARLSON	)	

DISSENTING OPINION (by Mr. Dumelle):

My main reason in dissenting in this case is my belief that the penalty imposed by the Board ($2,500) was much too low. I would have imposed a penalty of at least $15,000.

I believe these are four conditions that should be met when large penalties are levied after findings of guilty are made. These are:

1. The injury to the public and to the environment must be severe.

2. The party being penalized must be reasonably competent so that a presumption of foreknowledge of regulations can be made.

3. The party found guilty of polluting should not make money by his misdeeds.

4. The party being judged should be able to afford the penalty.

The Oct. 16, 1971 record shows with great clarity the extent of the injury to the public from Carlson's landfill operation. The Village President of the Village of Worth, Mr. Walter Kerkstra, stated

> Like a couple of other witnesses prior, I have noticed the obnoxious odors, for one thing. I have also witnessed-- I never seen a live one, but I have seen dead rats on the road in that area. I also have noticed the lack of cover on the landfill operation from time to time and, as a result of the lack of cover, many papers and debris, various kinds of debris, have blown into the forest preserve area to the east and north. (R. 64).

Mrs. Juanita Altman, a village trustee of Worth, stated

> Well, when I have gone by I have seen papers on the road, I have seen a messy situation with mud. I have also noticed rats. And it stinks to high heaven. And this

to me is pollution. (R. 51).

Mr. Gilbert Dobslaw verified odors and mud on the road (R. 59). Village Trustee John Featherstone testified as to odors, debris, papers and live rats from the Carlson operation (R. 69). Another trustee, Mr. Donald Christine, testified as to dirt and mud on the highway which was "actually hazardous" in rainy weather. He also verified the odors. (R. 73). Mrs. Patricia Cleary told of her asthmatic child and how she would have to give him a breathlyzer when going past the landfill (R. 76, 78).

And so, beyond a shadow of a doubt, Carlson's failure to operate his landfill properly caused odors, rats, litter, traffic hazards and health effects -- certainly severe enough effects to warrant a large penalty.

The next element in assessing a large penalty is reasonable competence. One does not penalize an incompetent. Mr. Carlson operates a landfill which serves 200,000 persons according to the stipulation, and so we can assume his competence to manage that large an enterprise.

The penalty should be such that, if possible under law, no financial gain ought be made by violating the law. Some pain but no gain ought to be the standard by which a penalty is set. See the dissenting opinion in GAF Corp. v. EPA, (PCB 71-11, Oct. 3, 1972) for a discussion of "savings-by-delay" (p. 3). Carlson has admitted in the stipulation to open dumping and failure to place daily cover on eight separate occasions (p. 3). A landfill in Illinois is required to place six inch layers of dirt over two foot thick layers of refuse. Thus 20% of the volume of a landfill as a minimum will be taken up by cover. Add to this extra cover required by the final dressing (two feet) and the proportion rises still further to perhaps 25% or 30%.

The Carlson landfill had an original volume of 1,600,000 cu. yds. (computed from the dimensions on p. 1 as given in the July 1972 "Impact Statement"by Roy F. Weston, Inc. attached to the stipulation). Assuming the pit was two-thirds full at the time the complaint was filed on Aug. 18, 1971 then some 1,070,000 cu. yds. of material might have been placed in it to that time. If all cover had been omitted to that time, some 260,000 cu. yds. of volume might have been saved. Space in a landfill is charged for at about $0.80 per cu. yd. Cover material itself, if not available at the site, might cost $1.00 a cu. yard. In toto, savings in costs and increases in revenues approaching $400,000 were possible! In this case, since we do not know the extent of omitted cover (except as we judge by the vehemence and sincerity of the witnesses mentioned earlier) or the volume already filled, the $400,000 figure can not be certified. But the example does illustrate that in landfill operation it might

pay well not to place cover material as required.

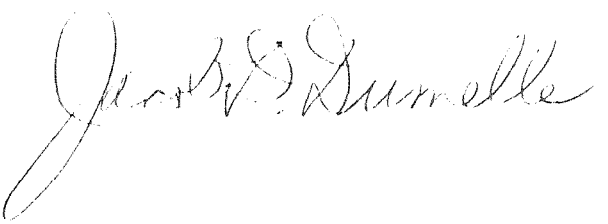
Lastly, in my outline at the beginning, I stated that the party being penalized ought to be able to pay. Since poverty has not been pled in this case we can assume that it is not an issue.

In one of the Board's earliest landfill cases (EPA v. Sauget, 71-29, May 26, 1971, 1 PCB 636) I dissented in a finding which levied only a $1,000 penalty upon a fulltime landfill operator who had been in the business for some 19 years. I said then

> The Board should look at the reasons for a penalty. If the penalty is to deter, then it should be a substantial one when guilt is shown and economic ability to pay is present. Otherwise the Board's penalties will become "licenses to pollute".

In this case, I agree almost entirely with the reasoning and findings in the majority opinion except as to the penalty. The majority opinion (second paragraph, p. 6) implies that the Board had no choice in this case but to accept or reject the penalty as an integral part of the stipulation (". . . we are not disposed to set it aside nor to conduct further hearings on the matter of penalty"). This is not correct as the latest stipulation dated Sept. 12, 1972 in paragraph 12(e) clearly leaves the penalty to be determined by the Board. I feel the majority has placed undue weight upon Carlson's $76,000 program of correction and his abatement of the problems he has caused by not following the law in the first palce. By his admitted flouting of the regulations he imposed a burden of nauseating odors, rats, litter, traffic hazards and air and water pollution upon the environment and the public. The environment is not his to pollute--it belongs to the public.

The penalty should have been more than a slap on the wrist.



I, Christan Moffett, Clerk of the Pollution Control Board, hereby certify the above Dissenting Opinion was submitted on the 11th day of December, 1972.