ILLINOIS POLLUTION CONTROL BOARD
April 6, 1989

WASTE MANAGEMENT OF ILLINOIS, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 88-190
	)	
LAKE COUNTY BOARD.	)	
	)	
Respondent.	)	

SUPPLEMENTAL STATEMENT (by B. Forcade, M. Nardulli, and J.D. Dumelle):

We note our concern with a portion of the recent decision of the Second District in Waste Management of Illinois v. The Pollution Control Board and Lake County Board, 175 Ill. App. 3d 1023, 530 N.E.2d 682 (2d Dist. 1988). A portion of that decision states that this Board must enunciate a review of each challenged statutory criterion in a proceeding such as this one. We must state that we respectfully disagree with the Second District on this issue, and will urgently pursue modification through all available avenues.

We note that today's opinion constitutes the forty-seventh landfill siting decision rendered by this Board. Each of those decisions represents an accommodation between two opposing forces. The first is the extremely short time frame allowed for Board decisionmaking on records that may easily run several thousand pages of transcripts (and twice that number of pages of exhibits). The second is the ability, within the statutory to time constraints, of four or more Board members to reach agreement on a particular detailed explanation in its opinion of the controversial and complex issues.

The Board has an obligation to provide on these proceedings "Orders and determinations," Ill. Rev. Stat. ch. 111 1/2, par. 1040.1(a) (1988); and referenced par. 1033(a) includes a duty to provide an opinion stating facts and reasons upon which this Board relied in reaching its decision. That obligation, however, flows to "Board" opinions; to the extent that a point of view does not garner four votes, it is not a "Board" opinion and the statutory obligation does not apply. On the other hand, almost all of the landfill siting decisions which are appealed to this Board simply list which criteria the applicant has met or not met. Those decisions seldom explain how or why the lower body decided any of the criteria, nor do they explain upon which facts reliance was placed. Even when they do, a question arises as to the weight to be given to these explanations.

The courts have specifically approved local government siting decisions that simply inform the applicant which criteria have been met or not met.* Thus, the Board now must review the voluminous record on each criterion to determine what the county could have reasonably relied upon, whether the county in fact did so or not. The first articulation to this Board of the "why and how" generally appears in the closing briefs, frequently less than 30 days prior to the statutory deadline for decision. At that point for the first time the petitioner may explain the facts and law upon which it relies to argue that the decision below is incorrect. In reply, for the first time, the respondent may provide facts and law to support the propriety of the decision below. Some of these after-the-fact rationalizations leave much to be desired in both quality and detail, and, indeed, do little to relieve the Board of the need to scrutinize the entire record to determine, in a manifest weight setting, on what the county could have reasonably relied.

This Board explains the why and how of its decision at the time that decision is rendered. But it must do so only to the extent that time and circumstances allow and only to the extent that a majority of the Board can agree on an outcome and rationale. The Board believes that, given these realities, it is far more beneficial to the parties and the courts for the Board to utilize its limited time to prepare a fully reasoned opinion on as many criteria as the majority can agree.

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* As stated by the Second District and upheld by the Supreme Court in reversing the Board on this matter:

> [N]othing in the statute would require a detailed examination of each bit of evidence or a thorough going exposition of the county board's mental processes. Rather, the county board need only indicate which of the criteria, in its view, have or have not been met, and this will be sufficient if the record supports these conclusions so that an adequate review of the county board's decision may be made. The assertion that the county board's opinion must state from which of the criteria the conditions flow finds no basis in the statute.
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> E & E Hauling, Inc. v. PCB, 116 Ill. App. 3d 586, 616, 451 N.E.2d 555, 577-78 (2d Dist. 1983), aff'd, 107 Ill. 2d 33, 481 N.E.2d 664 (1985).

The court reasoned that the Board's view would "deny the parties, and the reviewing court the benefit of the PCB's expertise" (Waste Management, 530 N.E.2d at 692). In fact, in reviewing landfill siting decisions, the Board's expertise is not fully utilized to decide the case by reweighing or re-evaluating the scientific and technical evidence. In landfill siting cases, the Board acts as an appellate body for review of the local government's decision, and as the Second District has held, review of the local government's decision by this Board is according to the manifest weight of the evidence standard. Waste Management of Illinois, Inc. v. PCB, 513 N.E.2d 592, 160 Ill. App. 3d 434, appeal denied 517 N.E.2d 1096, 117 Ill. 2d 555 (2d Dist. 1987), citing, E & E Hauling, Inc. v. Pollution Control Board, 116 Ill. App. 3d 586, 608, 451 N.E.2d 555 (1983), aff'd 107 Ill. 2d 33, 481 N.E.2d 664 (1985). The Board submits that under the manifest weight standard of review, with the requisite deference given to a local government's determination, utilization of the Board's own technical expertise is, at best, severely limited. Therefore, any benefits which a reviewing court would obtain from a detailed review by this Board are likewise severely limited.

Today's Opinion and Order of the Board represents a rationale upon which a majority of the Board's members agree. However, there has been in the past, and there will be in the future, cases in which there is no four-vote majority for a particular outcome on a particular criterion. We would hope that the parties and the reviewing courts would benefit more from full explanations on which a majority has been able to give thoughtful consideration than they would from an obligation simply to list areas of disagreement.

We would urge the Second District to adopt the rule followed by the Third District in Waste Management of Illinois, Inc. v. Illinois Pollution Control Board, 122 Ill. App. 3d 639, 645, 461 N.E.2d 542, 547 (3d Dist. 1984). The Third District simply ruled that, should there be a reversal on one criterion, the matter should be remanded to the Pollution Control Board for further review.

Bill S. Forcade, Board Member

Michael Nardulli, Board Member

J. D. Dumelle, Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Supplemental Statement was submitted on the 26th day of April, 1989.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board