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.	)	

THOMAS J. IMMEL (IMMEL, ZELLE, TURNER & OGREN) APPEARED ON BEHALF OF PETITIONERS; AND

WILLIAM J. BARZANO, JR. (ASSISTANT ATTORNEY GENERAL) APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER (by J. Anderson):

This matter is a permit appeal filed May 3, 1985 by M.I.G. Investments, Inc. and United Bank of Illinois (hereinafter, collectively "M.I.G."). M.I.G. seeks review of the March 28, 1985 decision of the IEPA ("Agency") denying M.I.G.'s application to modify the development of an existing solid waste management facility, the Bonus Landfill in Belvidere, Boone County, Illinois. The modification proposed involved a re-contouring to increase the height of the existing site; this would not, however, extend the boundaries of the site from those currently permitted.

The Agency denial letter had listed six grounds for denial of M.I.G.'s request, all of which were challenged in M.I.G.'s May 3 appeal. However, at the hearing held in this matter on July 9, 1985, the parties' presented a stipulation stating that they, had "resolved all differences save one", and that "Petitioner's agree to withdraw their Permit Appeal concerning all issues raised in the Permit Denial letter of March 28, 1985 except for Paragraph 1 thereof." (Joint Exh. A, Section 2-3). The sole issue before the Board for resolution, therefore, is whether the Agency correctly determined that Section 39(c) of the Act required it to deny the requested modification for the reason that:

> "Based upon the May 9, 1984 decision of the Circuit court (sic) of Lake County Illinois in the case titled Village of Antioch vs. Richard Carlson, Director of Illinois Environmental Protection Agency, and Waste Management of Illinois, Inc., Number 83-CH-454, local siting pursuant to

> Section 39.2 of the Act [also known as P. A. 82-682 or SB 172] is required for an increase in disposal capacity due either to new or different elevations above ground or trenches below ground."

Only minimal testimonial explanations of the parties' legal positions were made at hearing. The primary materials for the Board's consideration then are the Agency record, filed July 10, 1985, as supplemented August 12, M.I.G.'s opening brief of July 10 and response brief of July 30, as verified by filing of August 7, and the Agency's brief of July 19.

The Existing Bonus Landfill

The site was initially permitted by the Department of Public Health in 1969 and thereafter was repermitted by the Illinois Environmental Protection Agency in 1972. The owners of the facility have been the same since 1969, and a series of operators have run the site under lease. Since it opened in 1969, the site has been operated on an uninterrupted basis, taking municipal wastes and/or some special wastes. The special wastes have consisted for the most part of sludge from municipal water and waste water treatment facilities. The site has never been permitted to take hazardous materials, nor have such permits ever been requested.

The site map indicated that the existing landfill has an area of roughly 1900 ft. by 1300 ft. (Agency Rec. Item 3 and Supp. Rec. Item D). As noted in the narrative portion of the application for modification of the existing permit, the proposed recontouring lies "above existing contour 800". A maximum contour of 872 feet above mean sea level was proposed, as indicated in bold face on the site map. The final contours in the plansheet for the original permit indicate maximum final contours of 827 feet above mean sea level. (Supp. Rec. Items C,D. The 825 feet figure listed in the Agency permit reviewer's notes appears to be an error. See Agency Rec. Item 8). The Board notes that the site map indicates that an area of roughly 600 feet by 200 feet just west of the center of the existing site has elevations in excess of 830 ft.

The site map also depicts a proposed extension of the area of the existing landfill, addition of which land to the south and east of the existing site would more than double the landfill's size. Concerning this, M.I.G. stated:

> "A proposed extension of the existing landfill has been in the mill for more than two (2) years, and has now been re-filed with the County. Due to SB 172 machinations by the County, and the long delay therefrom, the site is currently running dangerously low in capacity.

*** This proposed height increase, as well as the proposed areal extension, is badly needed in the area. Some of the reasons are as follows: Closure of the City/County Landfill because of financial and environmental problems has been seriously discussed at recent County Board meetings. The distance to the nearest landfill; The practical absence of environmentally acceptable landfill site locations in the three (3) county area centered by Boone County;..."

The Antioch Decision and The Parties' Arguments Here

The procedural history of the Antioch decision is not entirely clear to the Board, based on the materials from that action submitted to the Board. These include the unreported single page Order of May 9, 1984 cited by the Agency in its denial letter (attached hereto as Appendix 1) and the unreported two page Order of April 23, 1984 (attached hereto as Appendix 2). Additionally, M.I.G. in its opening brief in this matter attached and incorporated by reference the Agency's response to a motion for summary judgment, and a 12 page brief in opposition to that motion filed by the Attorney General (M.I.G. Brief, p. 2 and Attach. 1,2). As the complaint in this matter was not provided, and the Circuit Court's Orders do not describe the nature of the action, the Board must surmise, based on the nature of the relief granted, that the Village of Antioch sought equitable relief in the form of an injunction order against both the Agency and Waste Management of Illinois, Inc. (Waste Management). Waste Management had sought a permit to change the final contours, by way of vertical expansion, of the H.O.D. Landfill, located within the boundaries of the Village of Antioch. The Agency had issued the requested permit on June 15, 1983 without proof of Antioch's site location suitability approval pursuant to Section 39.2 of the Act. (Id., Attach. 2, p. 1-3).

The Agency explained that it had not denied the permit, based on its interpretation of Section 3(x)(2) of the Act, defining "new regional pollution control facility" as "the area of expansion beyond the boundary of a currently permitted regional pollution control facility." The Agency stated that it had interpreted this section

"as not including permit applications under which only new space above or below ground surface would be occupied. Operating under this interpretation, the Agency has, between July 1, 1981 and June 30, 1983, issued at least 99 supplemental permits to regional pollution control facilities in which additional or different space would be occupied above or below the ground surface (this number includes the permit in dispute). *** Under these permits, regional pollution control facilities have included incinerators, waste treatment facilities, landfills,

> and waste storage facilities and the additional or different space above or below ground has been occupied by a variety of objects including berms, trenches, changed elevation contours, equipment, monitoring wells and buildings.
>
> A review of supplemental permits for the current fiscal year (July 30, 1983 to the current date) has not yet been made. If the rate of applications in this year is similar to the two previous fiscal years, approximately 20 to 25 supplemental permits for regional pollution control facilities in which new or different space above or below ground level is occupied, may have been issued. This could be a total of 120 to 125 such supplemental permits, for which proof of local siting approval was not required by the Agency." (Id., Attach. 2, P. 3-4)

In support of its interpretation of Section 3(x)(2) of the Act, the Agency argued that the plain meaning of the terms "area" and "boundary", as commonly understood, imply surface area and not volume:

> "Black's Law Distionary (Revised Fourth Edition) defines areas as "a surface, a territory, a region," and defines boundary as "every separation, natural or artificial, which marks the confines or line of division of two contiguous estates." This common usage indicates the words "areas" and "boundary" imply surface area.
>
> *** If the legislature intended new facilities to include expansion of the shape, or three dimensional volume occupied by these items, it would have not used the words "areas" and "boundary"; it would rather have used the words "volume" and "shape" so that the definition under Section 3(x)(2) would read "the volume of expansion beyond the shape or boundary of a currently permitted facility". However, the legislature used words pertaining to surface area, and its clear intent was thus not to include contour changes in the definition of new regional pollution control facilities." (Id., Attach. 2, p. 8).

The Agency further argued that, if the court determined that two constructions could be placed on Section 3(x)(2), that the Court could consider the legislative history of P. A. 82-682. Specifically, the Agency cited a comment during debate in the House of Representatives upon House consideration of the Governor's September 24, 1981 amendatory veto of the bill as passed July 1, 1981. In response to a question, the sponsor of the motion to accept the Governor's amendatory veto had stated that

> "[P. A. 82-682] applies to any new site or old site that is expanded beyond its original bounds. If [landfills] apply for a permit to take in one extra acre, this Bill would apply." (Id., Attach. 2, p. 10-11.)

Prior to the Antioch court's consideration of these Agency arguments, the permit holder, Waste Management, stipulated to the April 23, 1984 entry against it of an injunction permanently prohibiting it from "vertical enlargement of the Antioch Landfill Site" (Appendix 2, p. 2). Upon its consideration of the arguments presented by the Village and the Agency of the motion for summary judgment, the Court entered judgment for the Village. The June 15, 1983 permit was voided, and the Agency was enjoined from again issuing any such permit, based on the findings that

> "The increase of volume contemplated by WMI and permitted by the IEPA is a new regional pollution control facility and it was the intent of the legislature to require local siting hearings for such expansion.
>
> Any other interpretation would make the legislation a nullity." (Appendix 1).

The Agency asserts that it appealed this Order, but withdrew the appeal (Agency Brief; p. 6) (but see M.I.G. Reply Brief, p. 8).

In the instant action, the Agency states that "[n]ot only has the Agency abandoned the position it advanced in Antioch, but it has further now adopted that decision as its own and applied it accordingly" (Agency Brief, p. 2). In response to an argument by M.I.G. that the Antioch interpretation should not be applied to it because it was not a party to that proceeding, the Agency asserted that the precedent should be followed to avoid chaos and continual reinvention of the "wheel (legal precedent)", although admitting that the "precedential nature of the Antioch decision is not equivalent to that of a Supreme Court decision" (Id., p. 1). As noted by M.I.G., the Agency's brief did not thereafter address its earlier arguments, as adopted by M.I.G.. Instead, the balance of the brief contains an review of the case law concerning interpretation of the six criteria of Section 39.2.

M.I.G.'s final argument for rejection of the Antioch interpretation of Section 3(x)(2) is one of policy, relating to the 120 odd permits issued by the Agency prior to Antioch. M.I.G. asserts, in essence, that the validity of these permits is uncertain, because of their issuance without local approval pursuant to Section 39.2 of the Act (M.I.G. Reply Brief, p. 2).

Application of Stare Decisis

The threshold question is to what extent the Board is bound

to adhere to the holding in Antioch of the Circuit Court of the Nineteenth Judicial Circuit in Lake County, based on the doctrine of stare decisis. This doctrine may apply -- as res judicata and collateral estoppel may not -- when a second action is between different parties and from a different occurrence, yet the facts of the second case are substantially the same as the first case. American Emp. Ins. co. v. Yellow Cab Co., 49 Ill. App. 3d 275, 364 N.E.2d 948 (1977). Here, as in Antioch, the issue is whether Section 3(x)(2) of the Act, defining "new regional pollution control facility" by its terms encompasses the vertical landfill expansion proposed by petitoner, therefore precluding Agency permit issuance until local site location suitability approval is obtained pursuant to Section 39.2.

As noted by the Appellate Court for the Fifth District in Marathon Petroleum v. Briceland, 75 Ill. App. 3d 189, 394 N.E.2d 44 (1979):

> "As the Illinois Supreme Court said in Neff [v. George (1936), 364 Ill. 306, 4 N.E.2d 388]:
>
> *** The doctrine has more or less force, according to the nature of the question decided. Stated in its general and simplest terms, the doctrine of stare decisis expresses the policy of the courts to stand by precedents and not to disturb settled points. *** [But] where 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, especially if the former decisions are injurious and unjust in their operation (364 Ill. at 308-309, A N.E.2d at 390-391; for more recent discussions of the doctrine of stare decisis by the Supreme Court, see Maki v. Frelk (1968), 40 Ill.2d 198, 239 N.E.2d 445, and Molitor v. Kaneland Community Unit District No. 302 (1959), 18 Ill.2d 11, 168 N.E.2d 89.)" 394 N.E.2d at 46.

It is well settled Illinois law that each trial court is bound by decisions of all Illinois Appellate Courts (except in cases of conflict between Appellate Districts in which case a trial court is bound by decisions in its own district), and that Appellate Courts are bound by decisions of the Supreme Court; this is the case even if the inferior tribunal believes the superior one has made "bad law", e.g. People v. Thorpe, 52 Ill. App.3d 576 376 N.E.2d 960 (1977), People v. O'Neal 40 Ill. App. 3d 448 352 N.E.2d 282 (1976). However, as M.I.G. points out, courts are not bound to follow decisions of equal or inferior courts, e.g. Village of Northbrook v. Cannon, 61 Ill. App.3d 315, 377 N.E.2d 1208 (1978), although the rationale used by such courts may be awarded deference.

In the context of this proceeding, the Board finds the circuit court to be an equal, rather than a superior, tribunal.

The Act has vested in the Board and the circuit court concurrent jurisdiction to hear enforcement actions, People ex rel. WJS et al. v. Charles Janson, 57 Ill. 2d 451, 312 N.E.2d 62 (1974), but Section 41(a) has vested jurisdiction to review Board actions exclusively in the Appellate Court. The Board need not, therefore adhere to Antioch as a matter of law.

What the Agency's position was in 1983 is not on point because the Board was not presented with the issue at that time.

However, there are policies which militate against disturbance of a precedent which has served as the basis for Agency permit review in the two past years, nothwithstanding the Antioch decision's lack to detailed examination of the arguments there raised. A number of these were articulated by the Fifth District Appellate Court in its consideration of the arguments presented in Marathon Oil Co. v. Briceland, supra. In that case Marathon sought a declaratory judgment, requesting the court to reverse its interpretation of Rule 302(k) of the Board's Chapter 3: Water Pollution regulations as announced by the Court in Olin, Corp. v. IEPA, 54 Ill. App. 3d 480, 370 N.E.2d 3 (1977). The court declined to do so, stating

> "Even if we were convinced that our prior interpretation of Rule 302(k) was erroneous, which we are not, we would be slow to change it where, as here, it has been adhered to since our decision by the administrative agency charged with its enforcement, and is urged before us now by that agency as the proper interpretation. *** Because, like legislation, [administrative] rules and regulations can be amended, their judicial construction should not be lightly changed. (See Illinois Brick Company v. Illinois m(1977), 481 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707, where the court speaks of the "presumption of adherence to *** prior decisions construing legislative enactments ***.")
>
> *** For us to reconsider the rule here would only lead to new confusion in an area of law once confused and now settled. *** As Mr. Justice Brandeis stated, dissenting in Burnet v. Coronado Oil and Gas Company (1932), 285 U.S. 393, 406, 52 S.Ct. 443, 447, 76 L.Ed. 815: 'Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right [Citations.] This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation.'" 394 N.E.2d 46-47.

The Board believes that the situation here is best resolved by deference to the Antioch interpretation for the reasons articulated by the Marathon court. The Agency has been

implementing that interpretation for the past two years, and has "adopted it as its own". The area of law is now settled. The legislature has been free to change the Antioch court's interpretation, and the Agency's implementation, of Section 3(x)(2) for two years and has not done so, although amendments have been made to P.A. 82-682 during that period, e.g. P.A. 83-1522, effective July 1, 1985 and amending Section 39, 39.2, 39.3 and 40.1 of the Act, and S.B.113, currently awaiting action by the Governor, amending Section 39.2.

M.I.G.'s arguments are not so compelling as to overcome the Illinois Brick "presumption of adherence" to the Antioch interpretation. The vertical expansion of some 40-odd feet proposed by M.I.G. is not a de minimum one. While the Board takes notice that the site location suitability process can be time consuming, particularly in the event of appeals from the initial decision by local government, and that a landfill's disposal capacity might well be exhausted before such process can be completed, there are the natural consequences of the legislature's bifurcation of the siting and permit review functions formerly in the sole province of the Agency. As to M.I.G.'s argument concerning the pre-Antioch permits issued by the Agency, the Board would question whether the decision would or should be given retroactive effect.

Furthermore, the Board's holding is highly compatable with Section 39.2 criteria. Several of the criteria which, from the basis of local review, are as much impacted by vertical as areal expansion. Section 39.2(a)(1) clearly contemplates a volume rather than areal consideration in determining the necessity of the site to accommadate the waste needs of the area intended to be served. So too are the considerations of protection of the public health and welfare under Section 39.2(a)(2), the question of minimizing incompatibility with the character of the surrounding area and the effect on property values under Section 39.2(a)(3), as well as the consideration of traffic patterns under Section 39.2(a)(6).

Not 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.

For all of the foregoing reasons, the Board finds that the Agency correctly denied M.I.G.'s application for modification of its 1972 development permit to allow for vertical expansion of the Bonus Landfill by reason of M.I.G.'s lack of compliance with Section 39.2 of the Act.

The Board wishes to emphasize that this result is not to be construed as a finding that the procedures of Section 39.2 must be utilized for every proposal to alter the contours of a landfill; Section 39.2 is triggered by a proposal to increase the

waste disposal capacity of a site by expansion in any direction beyond the dimensions contemplated by permits issued prior to July 1, 1981.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

The Agency's March 28, 1985 denial of the January 24, 1985 application of M.I.G. Investments, Inc. and United Bank of Illinois for a permit to modify the final contours of the Bonus Landfill, Boone County, is sustained, for the reasons expressed in the foregoing Opinion

IT IS SO ORDERED.

J. Theodore Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 15th day of August, 1985, by a vote of 5-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board