ILLINOIS POLLUTION CONTROL BOARD
November 19, 1981

REYNOLDS METAL COMPANY, Petitioner,	)	
v.	)	PCB 79-81
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

DISSENTING OPINION (by D. Anderson):

I dissent from the Board's November 19, 1981 Order denying Reynolds' petition for rehearing concerning the Board's Order of August 20, 1981, which denied Reynolds' request for a variance from Rules 303, 305(a) and 305(b) of Chapter 7. I would grant the motion, reconsider the August 20 Order, and dismiss the petition for lack of information and failure to demonstrate arbitrary or unreasonable hardship.

I have three major areas of disagreement with the majority Opinion:

1. The facility is clearly exempt from the permit requirement, assuming an "on-site" facility is involved.

2. The operating requirements of Part III of Chapter 7 are applicable to the facility whether a permit is required or not.

3. It is Reynolds' responsibility to establish sufficient facts to show it is entitled to a variance.

This case concerns the on-site disposal exception of §21(d) which until recently provided:

> "(No person shall:)...conduct any refuse collection or refuse disposal operations, except for refuse generated by the operator's own activities, without a permit granted by the Agency upon such conditions..."

There are three cases which have been cited as holding the permit is required:

1. IEPA v. City of Pontiac, PCB 74-396, 18 PCB 303, (August 7, 1975);

2. People v. Commonwealth Edison, PCB 75-368, 24 PCB 200, (November 10, 1976; and,

3. R. E. Joos Excavating Co. v. IEPA, 58 Ill. App 3d 309; 374 NE 2d 486 (3d Dist. 1978).

The Pontiac case involved a question of whether a city-owned landfill site was "on site" with respect to the entire city's garbage. Joos involved disposal at one site of waste generated by the owner at another site. The language in these cases concerning "minor amounts" of refuse and "quarries" is incidental to the basis of these decisions and is dicta.

In the Commonwealth Edison opinion it is unclear whether the quarry was contiguous with the power plant and owned by the generator. The decision purports to be controlled by Pontiac, which seems to infer that it was a question of whether the disposal was "on site". However, the majority cites it as holding a permit to be required for on site disposal of large amounts of waste in a quarry. The case was apparently never appealed.

Since the August 20 decision, the §21(d) exemption has been amended by SB 875 (P.A. 82-380). Section 21(d) now provides:

(No person shall:) conduct any...waste disposal...operation:

1. Without a permit granted by the Agency or in violation of any conditions imposed by such permit...; provided, however, that no permit shall be required for any person conducting a...waste disposal... operation for wastes generated by such person's own activities which are stored, treated, disposed or transported within the site where such wastes are generated; or,

2. In violation of any regulations or standards adopted by the Board under this Act.

The legislation now states the holding of the Joos and Pontiac cases clearly: the wastes must be generated by the operator's activities at the disposal site. There is nothing in it about quarries or large amounts of refuse, codifying the purported holding of Commonwealth Edison. The Board took an active role in the drafting of this legislation. Had it wanted language about quarries or size it could easily have been inserted. Before SB 875 it may have been possible to further limit the exception through case law; this is no longer possible.

The amendments also clarify another point in controversy: whether the Board has authority to impose operating requirements on facilities which are exempt from the permit requirement (R80-20, R81-22). This has been answered affirmatively by splitting the permit and operating requirements into subsections, with only the permit requirement conditioned on whether an on-site facility is involved.

It should be pointed out specifically that the majority opinion does not hold that the Board lacks authority to impose on-site operating requirements. The majority rather holds that the Chapter 7 operating requirements (Part III) apply only in the context of a permit. This holding is at least consistent with the legislation. However, it is not consistent with the language and history of Chapter 7.

Rules 303 and 305 are stated in prohibitory terms directly applicable to the public, and are only incidentally rules directing the Agency to write permit conditions. Throughout its history the Board has consistently held that the operating requirements of Part III are directly applicable to the public whether or not there is a permit. Failure to apply cover is nearly always alleged in open dumping and landfill enforcements (People v. Giachini, PCB 77-143, 33 PCB 547, May 24, 1979; IEPA v. Carlstrom, PCB 78-153, 35 PCB 167, August 9, 1979).

This is consistent with Rule 208 which provides that the existence of a permit is a defense only to the permit requirement. This was a central policy of the older Board chapters and is the basis of the Supreme Court's decision striking down third party permit appeals: Agency permits do not cut off the public's right to bring an enforcement action based on violation of the Board's operating standards (Landfill Inc. v. IPCB, September 1978). The majority apparently has held that Part III is no longer enforceable.

Part of the majority's concern arises from a fear that compliance with Part III is impossible for many types of on-site "pits, ponds and lagoons." A better holding would limit the applicability of Part III to traditional landfilling operations, for example, holding the operating standards inapplicable to such things as sludge drying beds. In this particular case, Reynolds is engaged in a traditional landfilling operation squarely under Part III. It must voluntarily get a permit with adjusted conditions from the Agency or else it needs a variance from the Board.

Reynolds apparently operates the quarry on a contiguous site under a long term lease with the federal government (Motion, p. 5). This raises a serious question as to the scope of the on-site

exemption. The Board at first found that this was an independent basis for its finding that a permit was required. The Board then withdrew this finding, stating that "the record is insufficient with respect to Reynolds' rights and obligations under its lease agreement to establish the lack of an ongoing, extended responsibility for the subject site". This ignores the provision that the burden of proof is on Reynolds (§37 of the Act). As is discussed below, I would insist on details in a new variance petition.

I would dismiss the petition with leave to refile on the following basis:

Rules 303 and 305 provide that the Agency can approve alternative modes of operation in individual permits. However, Reynolds has no operating permit. Section 21 does not prohibit Reynolds from applying for a permit or the Agency from issuing a permit in spite of the exception. Had Reynolds pursued this option, approval of alternative modes of operation would have been governed by Section 39(a) concerning imposition of permit conditions. Reynolds has, however, elected to proceed by the variance route and must therefore demonstrate arbitrary or unreasonable hardship (Sections 35 and 36).

Reynolds has estimated that compliance would cost $108,000 for a road to the fill face and about $425 per day to apply daily cover (2:12). The Agency has proposed that the Board adopt new regulations which would eliminate the requirement that operators burying nonputrescible construction waste form cells and provide daily and intermediate cover (R80-20). In view of the low danger of this type of waste, the Board would certainly accept Reynolds' expenses as unreasonable hardship if this were a new operation. The problem lies in the material known to be already in the landfill and the absence of adequate information concerning all that is present. Although only inert material will go into the landfill in the future, this represents the continued operation of a general or possibly a hazardous waste site.

Reynolds is asking the Board to approve an alternative mode of operation without fully disclosing the nature of the wastes already buried. As operator of the site Reynolds has a duty to discover and disclose the contents of the site. The evidence is not convincing that enough effort has been made in this direction.

The site is presently producing leachate which could produce major pollution problems except for the dewatering activities in the Material Service quarry (Ex. 1, p. 1, 15; 2:53). Reynolds has no control over this (2:45). The variance

would be more acceptable if Reynolds obtained an agreement from Material Service to continue dewatering, or if the parties proposed a mechanism whereby any variance would be reviewed upon termination of dewatering. This could be done by a new variance application or a plan submitted for Agency approval.

Any variance granted by the Board could be construed as authorizing a continuation of leachate collection by use of the adjacent quarry or as an authorization for Material Service to pump and discharge untreated leachate. This could involve violations of the Act, Board rules and rights of Material Service. Any variance granted may require appropriate conditions or a disclaimer of any unintended effect, or a variance for Material Service. The parties have not addressed this.

There has been no attempt to sample the visible discharges from the wall which separates Reynolds from the quarry. This evidence, which could be persuasive as to the nature of the leachate produced, is missing.

By asking the Board to approve the requested variance, Reynolds is in effect asking the Board to approve a final closure plan for what may be a hazardous waste site. The Board is concerned that any variance granted would in the future be construed as res judicata on closure, relieving Reynolds of the duty to cure any pollution problems which may arise (35 Ill. Admin. Code §725.210; 5 Ill. Reg. 9781, October 2, 1981). The variance would be more acceptable to the Board if the parties could elaborate on Reynolds' future responsibilities. It may be necessary to impose a condition limiting the effect of any variance.

Reynolds leases the landfill site which is adjacent to the plant which it owns (Stip. 1). The identity of the owner was not disclosed in the record. There is no indication of any agreement between Reynolds and the owner fixing responsibility for closure and no commitment from Reynolds to close the site. Any future variance petition would be more acceptable if this were addressed.

Reynolds has not given a date for final closure of the site. It is not good to have this site only partially filled and collecting water to produce leachate. The Board would be more likely to grant a future variance if it were conditioned on a date for final closure. A variance without a date for closure could be construed as a permanent variance contrary to the intent of Sections 35 and 36(a).

Even assuming that hazardous waste is buried in the site, any final compliance plan probably involves filling the site with inert material, followed by final cover and grading to

prevent the passage of surface water through the waste to produce leachate. The Board should acknowledge that Reynolds' actions in placing construction rubble in the pit further this scheme. However, depending on the exact nature of the refuse and the possibility that Material Service may discontinue pumping, it may be necessary that Reynolds immediately spread, compact, apply daily cover, and commence pumping water from the fill face.

Section 35(a) of the Act authorizes the Board to grant variances upon a showing of arbitrary or unreasonable hardship. The intent of the Act is that the Board should balance hardship against the potential for damage to the environment and public health. From the evidence before it, the Board could not find that the above alternative imposes arbitrary or unreasonable hardship in light of the potential danger.

The petition should be dismissed with leave to file a new petition addressing the noted difficulties.

Donald B. Anderson, Board Member

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, do hereby certify that the above Dissenting Opinion was filed on the 3rd day of December, 1981.

Christan L. Moffett, Clerk
Illinois Pollution Control Board