

ILLINOIS POLLUTION CONTROL BOARD
October 1, 1984

WASTE MANAGEMENT, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 84-45
)	84-61
ILLINOIS ENVIRONMENTAL)	84-68
PROTECTION AGENCY,)	(Consolidated)
)	
Respondent.)	

OPINION, CONCURRING IN PART, DISSENTING IN PART (by B. Forcade):

While generally in agreement with the majority, I must dissent from section three of today's order concerning the intervention issue. While I am concerned about the potential impact that Landfill, Inc. has on our current procedural rules regarding citizen intervention, I strongly disagree with the Board's decision to vacate the hearing officer's order granting intervention. The practical effect of today's order is to repeal a Board procedural rule, without going through the proper rulemaking procedure and without specific direction from a higher court.

The majority correctly points out that there is no right of intervention expressly provided in Part 105, governing Permit Appeals. However, Section 105.102(a)(6) does incorporate the rules of Part 103 (enforcement proceedings) for use in permit appeals. These Part 103 rules are the only procedural rules that exist for permit appeal proceedings. They provide a right of intervention denied by today's Board action. The majority concedes that the citizens provided a sufficient showing of adverse effect through potential impact on their groundwater and property values. The majority concedes that notice is not an issue. Therefore, until the Board repeals these regulations through a proper rule-making proceeding that will incorporate statewide public participation or until a higher judicial authority specifically invalidates the rule in question, this Board should uphold rights created under its own rules. The Board has had almost six years since the Landfill, Inc. decision to modify its "invalid" procedural rules. It is unfair, at this late date, to deny the rights created under these regulations.

I also wish to concur with certain portions of the majority opinion concerning the Agency's authority to write permit conditions. While I agree with the majority's ultimate disposition of the challenged permit conditions, I do not endorse all of the reasoning.

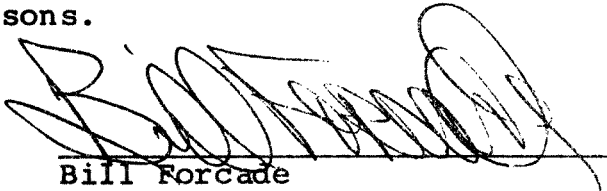
I believe that Section 39(a) of the Act grants the Agency broader authority to impose permit conditions than is implied by

the majority opinion in the last paragraph on page 36. The implication of this paragraph is that the power exercised by the Agency in the context of permit conditions is severely limited. This narrow interpretation of Agency authority is incorrect and unnecessary to today's decision. The majority recognizes authority specifically delegated by the Board and the Legislature in certain limited circumstances. I believe that Section 39(a) provides the Agency with a reasonable sphere of authority in the context of permit conditions, independent of other provisions of the Act.

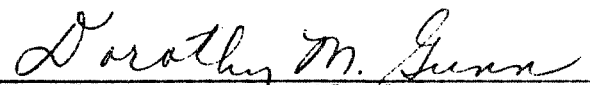
The Agency has been granted, by the terms of Section 39(a), the authority to "impose such conditions as may be necessary to accomplish the purposes of the Act, and are not inconsistent with the regulations promulgated by the Board hereunder." Consequently, I would analyze the validity of the challenged permit conditions by the limitations imposed by this section of the Act and by due process limitations. Permit conditions should be affirmed by this Board where the purposes of the Act are enhanced, where there is no conflict or inconsistency with Board regulations, and where conditions are not so subjective or overreaching as to violate principles of due process. The majority improperly finds a lack of Agency authority to issue certain permit conditions. I believe the conditions that are reversed today are invalid solely because they either directly conflict with current Board regulations or violate due process. Agency authority to impose permit conditions is not at issue.

I am concerned that the majority's rationale will eventually result in stripping the Agency of its rightful sphere of discretion and authority to write permit conditions. In so limiting the Agency's discretion, the Board may be relegating the Agency's permit condition authority to a ministerial function. This is an undesirable result and is contrary to the intent and design of the Act. Permit conditions act as a "safety net" in the overall scheme of environmental regulation and protection.

I agree with the result that the majority reaches today, but disagree with some of the reasons.


 Bill Forcade
 Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Concurring and Dissenting Opinion was submitted on the 2nd day of October, 1984.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board