

ILLINOIS POLLUTION CONTROL BOARD
August 10, 1984

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

CONCURRING STATEMENT (by B. Forcade):

I agree with the majority Order as written on all issues, save the ruling on attorney-client privilege. On that issue, I believe additional explanation is needed. The Agency claims that notes of a April 12, 1984, meeting between the Agency and the Attorney General's office are subject to attorney-client privilege and not discoverable or admissible as evidence, Waste Management disagrees. The chronology and substance of these three cases is very important in understanding the issues. Each of the three cases involves groundwater or groundwater monitoring for the ESL site.

The first case, PCB 84-45, concerns the supplemental permit for an expanded groundwater monitoring program. The permit was issued with conditions about March 2, 1984, and Waste Management appealed certain conditions in that permit to this Board on April 9. About April 20, the Agency denied an operating permit for Trench 11, claiming, in part, that monitoring results required by the supplemental permit challenged in PCB 84-45 had not been submitted. Waste Management appealed the denial of the operating permit for Trench 11 on May 25 in PCB 84-61. About April 30, the Agency denied supplemental permits for certain waste streams at ESL, claiming, in part, the same lack of monitoring data required by the permit appealed in PCB 84-45. Waste Management appealed denial of the supplemental waste stream permits on June 4, in PCB 84-68.

Thus, the controversial April 12 meeting between the Agency and the Attorney General's office took place after the permit appeal in PCB 84-45 had been filed but before the Agency made the permit decisions in PCB 84-61 and 84-68. To further complicate this matter, part of the Agency's reasons for denial of the permits appealed in 84-61 and 84-68 was the claimed failure to submit monitoring required by the permit appealed in 84-45. To the extent that the majority order attempts to separate matters pertaining to 84-45 from the "facts" in 84-61 and 84-68, it forces the hearing officer to unravel the Gordian knot.

The issue before the Board today is one of discovery and it is presented with little factual specificity. It is likely the Board will again face this issue when, at hearing, attempts are made to introduce the products of this discovery into evidence.

The Agency has asserted that post-decisional discussions between attorney and client merit a privilege of non-disclosure. Waste Management has extensively argued that pre-decisional communications may not be confidential. Neither party has argued the facts of this case: one communication that was both pre-decision and post-decision. Which legal principle prevails? Hopefully, final briefs will provide the Board some guidance in choosing between the rock and the hard place.



Bill S. Forcade
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Concurring Statement was submitted on the 14th day of August, 1984.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board