

ILLINOIS POLLUTION CONTROL BOARD
November 21, 1984

CITIZENS AGAINST HAMPTON)
TOWNSHIP LANDFILL,)
)
Complainant,)
)
v.) PCB 81-155
)
DAVID R. BLEDSOE, DAN LIGINO,)
STEVE LIGINO, and UPPER ROCK)
ISLAND COUNTY LANDFILL, INC.,)
)
Respondents.)

CONCURRING OPINION (by B. Forcade):

I disagree with the majority analysis of Count VII and believe the majority impermissibly intertwines Agency permitting and citizen enforcement. However, I reach the same conclusions as the majority and support the Order.

Citizen's Count VII claims that underground coal mines and soil permeability make continued operation of the facility a violation of Section 12(a) and 12(d) of the Act, which provides that no person shall:

- a. Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act;
or

* * *

- d. Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard;

Water pollution is defined to be:

"WATER POLLUTION" is such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.

Citizens have not argued in Count VII that the landfill is presently causing a problem, but that there is a threat of future pollution. Therefore, Citizens must prove a threat of (1) nuisance, or (2) rendering underground waters harmful or detrimental to health, safety, welfare, or other legitimate uses, including wildlife. After reviewing Illinois case law on this issue, I conclude that (1) and (2) above present identical standards.

The chief case in Illinois on this issue is The Village of Wilsonville v. SCA Services, Inc. with opinions from the Supreme Court (Ill. 426 N.E. 2d 824; 86 Ill. 2d 1; 1981) and Fourth District Court of Appeals (Ill. 396 N.E. 2d 552; 77 Ill. App. 3d 618; 1979). Under the Wilsonville theory, Citizens have to prove, by a preponderance of the evidence, four elements to prevail on their Count VII cause of action:

1. the presence of mining under the landfill.
2. Subsidence due to undermining.
3. Landfill liner rupture as a consequence of subsidence.
4. Movement of Leachate into an area where it may cause harm.

Citizens introduced evidence on these elements, and I believe the Board should make specific factual findings as to whether Citizens have proved them by a preponderance of the evidence.

While the evidence in this case is not sufficient to remove all doubt on the issues, I still believe the Board must make factual findings according to where the greater weight of the evidence lies. Preponderance of the evidence does not mean that there is no remaining doubt concerning an issue, only that it is more likely true than not.

1. "Preponderance of evidence" is equivalent to "weight of evidence" and means that the proof on one side of a cause outweighs the proof on the other. Cleveland, C., C. & St. L. Ry. Co. v. Trimell, 75 Ill. App. 585 (1897).
2. A preponderance of evidence, however slight, in favor of plaintiff, but by no means removing all doubt, is sufficient to justify verdict for plaintiff. Sears Roebuck & Co. v. Winchester Repeating Arms Co., 178 Ill. App. 318 (1913).
3. The phrase "preponderance of the evidence" means the greater weight of the evidence, that is to say, such evidence as, when weighed with evidence which is offered to oppose it, has more convincing power in minds of jurors. Griffy v. Ellis, 168 N.E. 2d 58, 26 Ill. App. 2d 112 (1960).

4. Proposition proved by a "preponderance of the evidence" is one that has been found to be more probably true than not. Estate of Ragen, 34 Ill. Dec. 523, 398 N.E. 2d 198, 79 Ill. App. 3d 8 (1979).

With these standards in mind, I would make specific factual findings on the relevant issues. For clarity, I have summarized the relevant facts supporting my opinion in a Table and map.

UNDERMINING

Visual observations of evidence of mining activity were given by four witnesses who all identified the same structures and placed them within the same area on the Bledsoe landfill. These structures are an old fan of the type used in mine airshafts and a mine opening or airshaft. One witness saw the mine opening in 1920, whereas the other three sightings are more recent and appeared to be an opening or airshaft in a ridge with the fan protruding from it (See Table 1). This evidence is corroborated by information given in Complainant's Exhibit 30, pg. 8.

There are historical records of several active mines in the area of Hampton Township. Mines #3 and #6 are of the most interest because they were so near the landfill. The locations of mines #3 and #6 (map M3, M6) were established from Illinois State Geological Survey information. Mine #6 was located near the northern edge of the north fill and extended toward the south. Due to the inaccuracy of the records, available maps may be in error by as much as $\frac{1}{4}$ - $\frac{1}{2}$ Section (R. 122). An error of this magnitude could result in placing the Hampton mine #6 directly under the north fill and extending southwest to the mine opening on the landfill. Several maps show that mining took place primarily in Sections 15 and 16 with very little in Sections 21 and 22 (R. 124, 144, 154-158, 537, 869, 898, 926-27).

The presence of subsidence is a strong indication of past mining activity. Subsidence has occurred in a 180° arc surrounding the landfill, beginning east of the landfill and continuing to the northwest. There are two types of subsidence present, pit and sag; pit in the form of sink holes and sag in the form of large saucer indentations. The diameter and depth vary and are summarized in Table 1.

The strongest evidence presented by Bledsoe against mining was (1) statements by experts that undermining was highly unlikely in view of historical records and geology, and (2) the fact that none of Bledsoe's 28 borings encountered voids. The conclusory statements by the experts that undermining is highly unlikely can hardly refute the direct observational testimony. The fact that 28 borings did not uncover a mine (one boring per 5 acres) does not raise a probability that no undermining exists.

The visual observations by four people of evidence of mining on the landfill property, corroboration by ISGS records (R.131-136,

138-143, Comp. Ex. No. 13), and pervasive subsidences in the immediate vicinity of the fill require a finding that the Bledsoe fill is undermined.

SUBSIDENCE

Undermining may lead to subsidence, however, it is impossible to predict when it may occur or the area it will cover (R. 934). Subsidences near the Bledsoe property occurred as long ago as 50 years and as recently as six years (R. 200-220). The presence of a horse or tractor has caused subsidence (R. 457). Subsidence has occurred (S8) and there is a reasonable probability that subsidence will occur on the landfill property in the near future. I find that Citizens have established this element.

LEAKAGE

If the undermining causes subsidence on the landfill property it will rupture the liner. This would provide a direct route for leachate spillage through the subsidence feature. The leachate could travel into the mines and pool or move out of the area via the mine tunnels (R. 556-60). Any leachate may be contaminated with Cadmium, Barium, Zinc, and Lead (Comp. Ex. 37).

Bledsoe's witnesses stated that the permeability of the soil is low enough to prevent the escape of contaminants (R. 901-910). While this may be true for long term diffusion of leachate, soil permeability is not an issue in a rupture-leakage situation.

LEACHATE MOVEMENT

The last link in the chain of facts which Citizens must prove is the probability of leachate movement away from the site into an area where it may cause harm.

The proposed mechanism is that the Pennsylvania strata (principally shale) containing the coal is very brittle with a tendency to fracture. Large linear cracks develop by differential compaction or earth movement. These cracks could provide a route for leachate to move (R. 563-65).

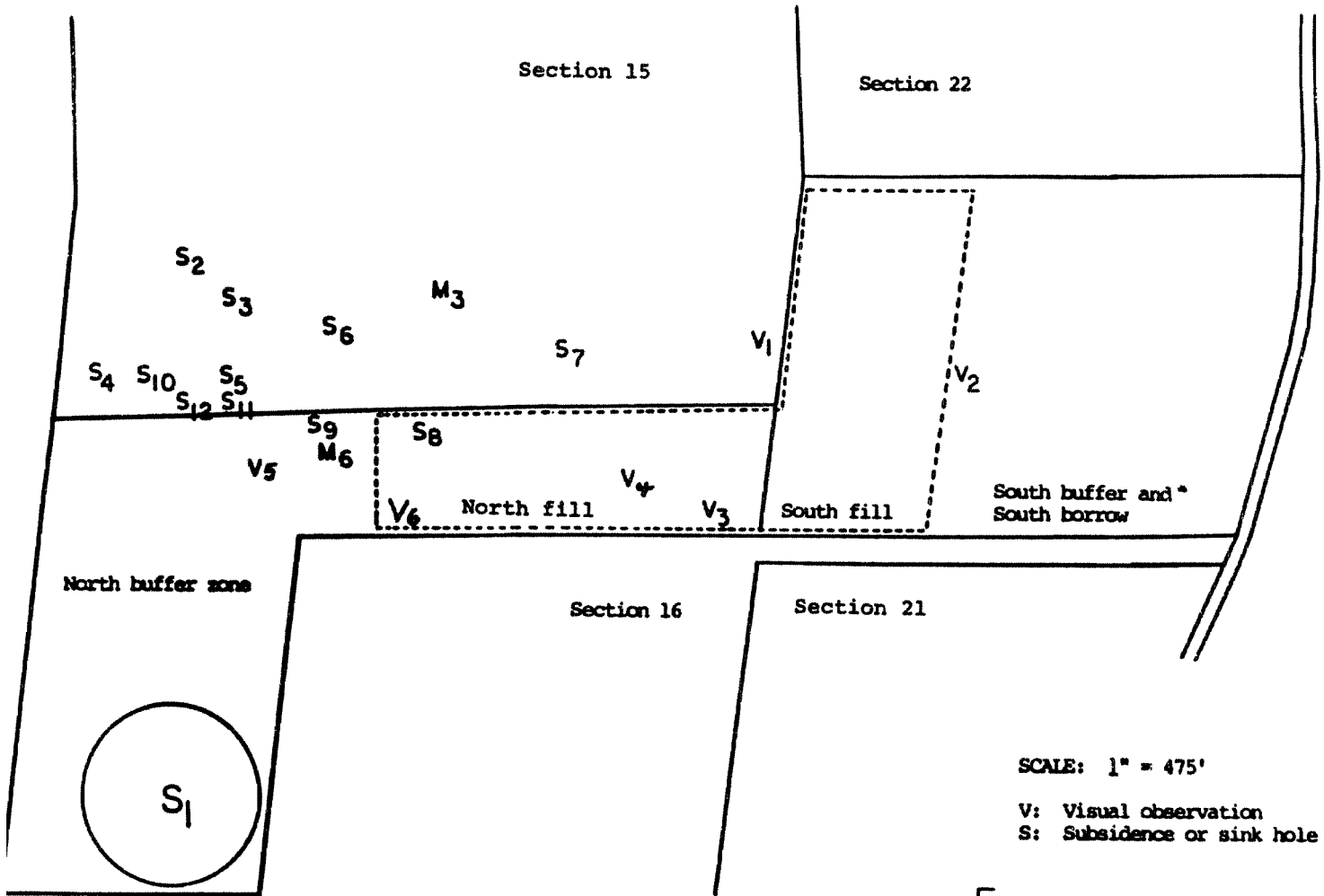
Citizens did not provide testimony establishing any specific aquifer near the landfill, nor did they provide reasonable testimony that there is a high probability of leachate movement to any aquifer or nearby private wells.

Bledsoe provided testimony that subsidence takes place at the coal level beneath which there is enough shale to protect any underlying limestone aquifer (R. 953-55). Moreover, this shale is very plastic with a high clay content and the mines are sealed above and below with shale (R. 883-40).

Therefore, Citizens has not proven by a preponderance of evidence that leachate would move away from the mine into an area where it would cause harm.

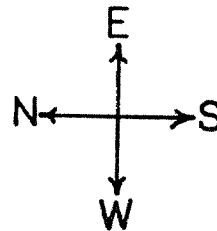
TABLE 1

<u>SITE ID</u>	<u>EVENT</u>	<u>INDIVIDUAL</u>	<u>RECORD</u>
V ₁	27' deep well; vertical tile believed to be mine drain	Herschel Cook	200-220
V ₂	tile outlet draining east to west; believed to come from V ₁ and S ₇	Herschel Cook	200-220
V ₃	mine airshaft, old fan mine opening mine opening, fan	John Gerstner Ramon Cabry Maurice Wenk	289 456 1068
V ₄	ridge with protruding fan	Herschel Cook	200-220
V ₅	large hole into a slope	Herschel Cook	218
V ₆	mine opening into hill sloping NW	Ramon Cabry	455
S ₁	subsidence: approximate area	Dale Lundbert	82-83
S ₂	50 year old subsidence	Herschel Cook	200-220
S ₃	sink hole, 1973	Herschel Cook	200-220
S ₄	sink hole, 1951 8'-10' deep, 8'-10' diameter	Herschel Cook	200-220
S ₅	sink hole	Herschel Cook	200-220
S ₆	sink hole 10' deep, 4' diameter	Herschel Cook	200-220
S ₇	large saucer subsidence	Herschel Cook	200-220
S ₈	small sink hole	Herschel Cook	200-220
S ₉	sink hole	Herschel Cook	200-220
S ₁₀	subsidence 15' deep, 20'-30' diameter	John Gerstner	293
S ₁₁	sink hole 15' deep; created by the weight of a horse	Ramon Cabry	457
S ₁₂	subsidence; created by the weight of a tractor	Ramon Cabry	458



SCALE: 1" = 475'

V: Visual observation
S: Subsidence or sink hole



PERMITTING V. ENFORCEMENT

The majority, at page 12 of the Opinion states:


As for permeability of the soil at the site, Citizens has failed to bring forth any new evidence as to permeability testing that was not before the Agency. It simply disputes the prior test results. Citizens has failed to meet its burden of proof as to this issue.

Other portions of the Opinion consistently reference whether Citizens' evidence was or was not before the Agency at the time the Agency decided to permit the Bledsoe fill. Without explanation, this implies that Citizens had some burden to supply new evidence not before the Agency.

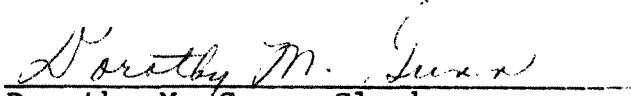
In Landfill Inc. v. IPCB, Ill. 387 N.E. 2d 258, 1978, the Supreme Court denied citizen appeals of Agency permit grants holding that the appropriate remedy for citizens aggrieved by Agency permit grants was to file an enforcement proceeding against the permittee claiming threatened pollution:

Section 31(b) authorizes citizen complaints against alleged violators of the Act, any Board rule or regulation, or Agency permit; it requires the Board to hold a hearing on all such complaints which are not "duplicitous or frivolous" (Ill. Rev. Stat. 1975, ch 111½, par. 1031(b)). At that hearing, the complainant bears the burden of showing actual or threatened pollution or actual or threatened violations of any provisions of the Act, rules, regulations, or permits. (Ill. Rev. Stat. 1975, ch. 111½, par. 1031(c).) The grant of a permit does not insulate violators of the Act or give them a license to pollute; however, a citizen's statutory remedy is a new complaint against the polluter, not an action before the Board challenging the Agency's performance of its statutory duties in issuing a permit. As the principal draftsman of the Act has noted, "One receiving a permit for an activity that allegedly violates the law can be charged with causing or threatening to cause such a violation in a citizen complaint under section 31(b), and the regulations expressly provide that the existence of a permit is no defense to such a complaint." (Emphasis added.) Currie, Enforcement Under Illinois Pollution Law, 70 Nw.U.L.Rev. 889, 478 (1975).

Any determination by this Board that Bledsoe's permit is some level of proof that pollution will not occur makes that permit a partial defense to the Complaint in violation of Landfill, Inc. To the extent the majority so holds, I disagree.


 Bill S. Percade
 Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Concurring Opinion was submitted on the 5th day of November, 1984.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board