ILLINOIS POLLUTION CONTROL BOARD
October 23, 1986

IN THE MATTER OF:	)	
HAZARDOUS WASTE	)	R86-9
PROHIBITIONS	)	

CONCURRING OPINION (by J. Theodore Meyer):

I wish to supplement the Board's Order of today denying Citizens' for a Better Environment (CBE) motion for disqualification directed towards me. CBE contends that my participation in the passage of S.B. 171 into law now disqualifies me from deliberating on the merits of the proposed rule arising out of that legislation. I might note that in addition to S.B. 171 my involvement with environmental legislation during my tenure in the House was extensive. I was a cosponsor of the Act creating the Board and was a member of the committee which oversaw the passage of all environmental legislation in the House. In addition, I voted on every piece of environmental legislation from 1969 to the time I left the House. Thus, were CBE's position successful, in effect, I would be precluded from participating in almost every conceivable matter that might come before the Board because of my legislative experience. Moreover, this argument, if successful, would preclude every former legislator from serving on a board or commission if he or she participated in any way in the passage of legislation concerning the entity. Just how much participation would be necessary to require disqualification or recusal is not delineated by CBE. For instance, would voting alone, whether for or against the legislation, be sufficient to require recusal? In any event, it is CBE's position that the level of my participation with S.B. 171 has risen to the point of objection.

On this point, I would suggest that the recent Second District Case of M.I.G. Investments, Inc. v. Environmental Protection Agency, No. 2-85-734 (October 15, 1986) is instructive of how courts are likely to view this argument. In M.I.G. Investments, the Board had construed the legislative intent of S.B. 172, the companion bill to S.B. 171 at issue today. Similarly, I was involved in the passage of S.B. 172 into law as the Chairman of the House Energy and Environmental Committee and sponsor of the governor's amendatory veto. Based on my experience with S.B. 172, I dissented from the Board's interpretation of the legislative intent. In reversing the Board, the court cited my dissent and noted that because of my legislative experience with S.B. 172 my interpretation of the legislative intent was entitled to some weight in its analysis. Slip op. at 10. Nowhere did the court question my right to voice that interpretation as constituting "bias". Rather my

interpretation was accorded some persuasive value by the court. Clearly, "this turn of affairs" constitutes an implicit rejection of CBE's position.

In addition, I would like to point out that CBE's argument could be used against other Board members besides former legislators. In this regard, the Environmental Protection Act (Act) requires that each Board member be "technically qualified." Section 5. At the same time federal laws and regulations prohibit the appointment of Board members too closely tied to the regulated industry. See Section 128 of the Clean Air Act and 40 C.F.R. Section 123.26(c) (1986). Together these two strictures leave a rather small pool of qualified persons to serve on the Board. CBE's argument that a former legislator should not participate in decisions concerning legislation he is familiar with could extend to all forms of technical expertise since that very expertise could arguably lead to a predisposition one way or another. Thus, followed to its logical conclusion, CBE's argument would require the disqualification of Board members from participation on the very matters that they are most familiar with. As a result, the Act's requirement for technically qualified people would be stood on its head since the experts would be prohibited from assisting the Board in their areas of expertise.

Finally, I would like to take issue with the tone of the order as written today as I believe it erroneously leaves the ultimate question unanswered. The Board's order is ambiguous as to whether or not it has the authority to disqualify its members. While the order recites case law on this subject which principally supports the proposition that no such authority exists in boards and commissions, it implies that under certain circumstances the Board may have such power. For example, the conclusion of the order rests on a discussion of In the matter of Segal and Smith, 5 FCC 3 (1937) holding that in a judicial or quasi-judicial proceeding the Federal Communications Commission could disqualify a member. The Board concludes, however, that this matter is neither judicial or quasi-judicial and "[t]o allow a majority of the Board to determine the eligibility to vote of an individual Member in a particular regulatory proceeding would be to travel a road fraught with hazards." Or. at 3 (emphasis added). Thus, the order as written implies that in quasi-judicial or judicial matters the Board may order one of its members not to vote. A similar qualifier is also made at the conclusion of the order where it is stated that "[t]he Board does not believe that in a regulatory proceeding it should exercise its authority, if any, to rule on the qualification of one of its members to participate in the decision absent compelling circumstances." Id. (emphasis added). This implies that in certain "compelling" situations the Board may find the authority to disqualify a member whether the matter is regulatory in nature or not. Nowhere in the Environmental Protection Act, the

Administrative Procedure Act or Roberts Rules of Order is such authority granted to the Board. I suggest that in any proceeding, whether judicial, quasi-judicial or not, a determination that the power of disqualification does rest with the Board and the exercise of that power would lead to disaster. What safeguards would exist to prevent the majority from simply disqualifying the minority? Such a situation would upset the balance of power in the Board envisioned by the Act and usurp the authority of the Governor to appoint 7 equal and independent members who are then confirmed by the Senate.

Thus, although I agree with the result of today's order I do not feel that the order goes far enough and for the foregoing reasons concur.

J. Theodore Meyer
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Concurring Opinion was submitted on the 9th day of October, 1986.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board