ILLINOIS POLLUTION CONTROL BOARD
December 6, 1989

METROPOLITAN WASTE SYSTEMS, INC., SPICER, INC. and SPICER PROPERTIES, INC.,	)	
Petitioners,	)	
v.	)	PCB 89-121
CITY OF MARSEILLES,	)	
Respondent.	)	

SUPPLEMENTAL OPINION (by J. Anderson and J. Marlin):

On December 6, 1989, the Board adopted, by separate vote, an Opinion and Order affirming the July 26, 1989 decision of the City of Marseilles ("City") denying siting location suitability approval for a new regional pollution control facility to Metropolitan Waste Systems Inc. ("Applicants"). Preceding this vote, the Board also had voted separately on the language addressing each criterion in the draft Opinion. For different reasons, the necessary four votes on Criterion No. 1 were not forthcoming. The portion of the Board's Opinion relating to Criterion No. 1 states:

> Six members of the Board were present at the December 6, 1989 meeting at which decision in this matter was statutorily required to be made. Section 5 of the Act provides that "4 votes shall be required for any final determination by the Board." The draft Opinion discussed at the meeting failed to pass, the Board being "deadlocked" at a 3-3 vote. As a statutory majority of 4 votes could not be mustered for any written Opinion, there is no Opinion of the Board as to the Criterion No. 1 issue in this case.

We wish to supplement the record with our views on Criterion No. 1.

First, we agree with Board Member Nardulli's Supplemental Opinion insofar as it states that the language in the draft Opinion regarding Criterion No. 1 should have been included as appropriate and as not reversing any precedent in the Board's opinion in Fairview Area Citizens Task Force v. Village of Fairview, PCB 89-33.

Second, we would have reversed the City of Marseilles' holding that the applicant had failed to meet Criterion No. 1.

Regarding the draft language issue, we would add the following observations to those of Board Member Nardulli.

There is nothing in Section 39.2 of the Environmental Protection Act that allows a city or county to unilaterally amend an application, which is, in effect, what the City would have done in recasting the intended service area in order to support a denial. The applicant is the only person, pursuant to the second paragraph of Section 39.2(e), who can change the scope of an application, and even then can do so only once. The first paragraph of Section 39.2(e) only allows the decisionmaker to impose conditions as part of the approval of the application.

It is one thing to weigh the record, including the application; it is another thing to, in effect, expunge those parts of the record that a decisionmaker doesn't want to consider at all. Here, it is argued that, if two distant counties in the intended service area were removed, then the City could easily deny on Criterion No. 1. What is to stop a decisionmaker from picking and choosing those elements of an application it wants to ignore in any of the other criteria if, by their inclusion, the decisionmaker would be hard put to deny.

We appreciate that a city or county in their traditional role as legislative policymakers would naturally focus on the needs of their nearby citizens; however, in an SB 172 setting, the decisionmakers are placed in a non-traditional, quasi-judicial role as regional decisionmakers, a role that restricts their ability to view the criteria from a local policymaking perspective.

Regarding Criterion No. 1, we do not believe that the City can refuse to consider the intended service area as proposed any more than it can refuse to consider the location of the facility as proposed because it would have preferred that it be located elsewhere. We note that, were this a proposed hazardous waste facility, its intended service area would likely be far reaching, extending into other states. In any event, we believe that, absent a legislative amendment, it is the applicant that defines the intended service area.

We certainly did not, in voting for the Fairview Opinion, construe the language, in the context of that Opinion, as setting the precedent advocated by Board Members Dumelle, Forcade and Flemal in their Supplemental Opinion, nor do we recall any discussion at that time as to the precedential intent now advocated.

Regarding the City's negative finding on Criterion No. 1, and assuming that the City cannot refuse to consider distant portions of the service area, we find no support in the record,

on a manifest weight basis, to affirm the City's determination. The remaining life of the facilities in question, as testified to by the applicant, was essentially uncontroverted. Given the realistic lead time that now exists for getting site hydrogeological analysis, design, etc. completed, getting through the SB 172 process-appeals and all-and completing the permitting process, and the time it takes to develop the facility, we believe that the limited life expectancy of the existing facilities in the intended service area amply demonstrated that the facility was necessary, and cannot find any support in the record for the County reasonably concluding otherwise. In this day and age, twice as long as the 4 1/2 years projected is arguably insufficient lead time to get the first cubic yard of solid waste disposed of. Even the Objectors implicitly recognized that a negative finding on Criterion No. 1 rested on a redrawing of the service area.

Joan G. Anderson
Board Member

John C. Marlin
Chairman

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Supplemental Opinion was entered on the 17th day of January, 1990.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board