ILLINOIS POLLUTION CONTROL BOARD
August 26, 1991

CLEAN QUALITY RESOURCES, INC., Petitioner,	)	
v.	)	PCB 91-72 (Landfill Siting Appeal)
MARION COUNTY BOARD, Respondent.	)	

MR. WILLIAM P. CRAIN SPECIALLY APPEARED ON BEHALF OF THE PETITIONER.

MR. ROBERT SHUFF APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by M. Nardulli):

This matter comes before the Board on the May 1, 1991 "Special and Limited Appearance, Petition for Review and Objection to Supplemental Proceedings" filed by Clean Quality Resources, Inc. Clean Quality Resources (hereinafter "CQR") applied to the Marion County Board for site location suitability approval for a new regional pollution control facility pursuant to Section 39.2 of the Illinois Environmental Protection Act (hereinafter "Act"). (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1039.2.) CQR's proposed facility is an aqueous hazardous waste treatment and storage facility located outside of the City of Centralia, in Marion County. CQR is appealing the Marion County Board's denial of site location suitability approval.

This matter is before the Board for the second time. The case was originally docketed as PCB 90-216; the Board remanded this matter to the Marion County Board (hereinafter "MCB") on February 28, 1991. A full history of this case is given immediately below.

CQR has raised many issues challenging the actions of this Board, and the decision of the MCB. These issues will be addressed in full below. The Board finds, after full consideration of all the briefs and records[1], that 1) CQR's application for site location suitability is not approved by operation of law, 2) the MCB's determinations on criteria 1, 2,

[1] The Board hereby incorporates the briefs of the parties submitted in PCB 90-216. The county board record for PCB 90-216 was incorporated into this proceeding in the Board's Order of May 9, 1991.

5, 6, and 7, were not against the manifest weight of the evidence and 3) the MCB's determination on criterion 3 was against the manifest weight of the evidence. The Board hereby affirms the Marion County Board's denial of site location suitability.

BACKGROUND

ENVIRONMENTAL PROTECTION ACT

Pursuant to Sections 39(c) and 39.2(a) of the Act, a new regional pollution control facility is required to request and receive siting approval from the local county board before a development or construction permit is issued by the Illinois Environmental Protection Agency ("Agency"). (Ill. Rev. Stat. 1989, ch. 111 1/2, pars. 1039(c) and 1039.2(a).) Section 39.2(a) provides that an applicant seeking site approval must demonstrate compliance with each of the enumerated criteria of this section before the county board can grant approval. The decision of the county board is reviewable by the Board pursuant to Section 40.1 of the Act. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1040.1.) The Act requires the Board to consider the written decision and reasons of the county board, the record of the hearings before the county board and the fundamental fairness of the procedures used by the county board to reach its decision. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1040.1(a).)

PROCEEDINGS UNDER PCB 90-216

CQR filed an application for site approval of a new regional pollution control facility with the MCB on April 16, 1990. Pursuant to Section 39.2(d), the MCB held a total of fourteen hearings over a four month period. On October 11, 1990, two days before expiration of the 180-day statutory deadline for taking final action on the application, the MCB voted unanimously to deny CQR's request for site location suitability approval on the basis that CQR did not satisfy criteria (1) and (3) of Section 39.2(a) of the Act. At that time, the MCB did not make any findings on criteria (2), (4), (5), (6), and (7). On October 29, 1990, sixteen days after the statutory deadline for final action, the MCB issued a written "Notice of Decision" which was sent to CQR. (R. at C1886.)

CQR appealed the decision of the MCB denying site location suitability approval to this Board on November 14, 1990 pursuant to Section 40.1(a) of the Act. Pursuant to that same section of the Act, the Board held a hearing on January 25, 1991 which both parties and members of the public attended. Following hearing, CQR filed its brief on January 31, 1991, the MCB filed its brief on February 11, 1991, and CQR filed its reply brief on February 21, 1991. Several interested parties were allowed to file amicus curiae briefs.

The Board issued a final Opinion and Order on February 28, 1991, remanding the matter to the MCB for clarification of its

vote on the remaining applicable criteria of Section 39.2(a). CQR appealed the remand order to the Illinois Appellate Court. The court granted the Board's motion to dismiss the case because the Board's February 28, 1991 Opinion and Order was not final and appealable. Clean Quality Resources v. IPCB, No. 5-91-0156, May 6, 1991.

PROCEEDINGS UNDER PCB 91-72

While the PCB 90-216 appeal was before the appellate court, the Board received a certified copy of a "Resolution" containing the MCB's final determinations on the remaining criteria as directed by the Board. On April 11, 1991, the Board issued an order informing CQR that since the prior docket was closed and new findings had been submitted, CQR required a new petition for review to appeal the new findings. The Board waived the requirement of a filing fee for this new petition.

On May 1, 1991, CQR filed a "Special and Limited Appearance, Petition for Review and Objection to Supplemental Proceedings" (hereinafter "Limited Appearance"). In its Limited Appearance, CQR objected to the supplemental proceedings ordered by the Board and claimed the Board was without jurisdiction or statutory authority to order those proceedings. In addition, CQR refused to participate in any further proceedings except to file a formal statement of position detailing CQR objections.

The Board held a hearing in this matter on July 5, 1991 for presentation of arguments on all contested criteria. Counsel for the MCB and members of the public attended the hearing; CQR did not. On July 22, 1991, the MCB filed its post-hearing brief.

On July 5, 1991, CQR filed a "Statement in Support of CQR's Special and Limited Appearance and Objection to the Supplemental Proceedings" (hereinafter "Support Statement"). This filing presents CQR's many arguments concerning the objections to the Board's Orders in this matter, interpretations of the Act, and the status of CQR's application for site approval. These arguments will be discussed in detail below.

DISCUSSION

AMICUS CURIAE

On July 17, 1991, the Board received a request by the City of Centralia, James B. Wham, Daniel R. Price, and Residents for Environmental Safety to file a "Joint Amicus Curiae Brief" (hereinafter "Joint ACB"). The Joint ACB requests that the Board take administrative notice of the amicus curiae briefs filed in PCB 90-216 in order to prevent reproducing identical pleadings. The Board grants leave to file the Joint ACB. The Board also grants the amicus curiae request for administrative notice of the amicus curiae briefs filed in PCB 90-216.

The Joint ACB states:

> "[t]he jurisdictional issues and the challenge to the constitutionality of a portion of the statute . . . raised by the parties in their Amicus Curiae Briefs filed in PCB 90-216, were not addressed by the Pollution Control Board at the time of the remand order, but said issues are still in issue and are again raised herein by said parties for consideration."

By definition, amicus curiae means "a friend of the court." Black's Law Dictionary 75 (5th ed. 1979). The amicus curiae are not parties to this proceeding and cannot raise new issues or constitutional challenges for consideration. Zurich Insurance Company v. Raymark Industries, Inc., 118 Ill.2d 23, 514 N.E.2d 150 (1987)(amicus curiae is not a party to an action and cannot engage in motion and pleading practice as if a litigant). The function of amicus curiae is to advise or make suggestion to the court. Zurich Insurance Company v. Raymark Industries, Inc., 118 Ill.2d 23, 514 N.E.2d 150 (1987). Therefore, the Board will only consider the contents of the Joint ACB, and the other amicus curiae briefs filed in PCB 90-216, as those contents conform to legal practice and precedent.

JURISDICTION OF THE BOARD

CQR's Limited Appearance contends that the Board and the MCB were "without the jurisdiction and/or statutory authority" to, respectively, remand this matter (PCB 90-216) and conduct supplemental proceedings. Consequently, CQR asserts that the Board does not have jurisdiction over this present proceeding (PCB 91-72). In support of this statement CQR argues that the Board cannot raise fundamental fairness issues on it own and that a remand is an inappropriate final action since it ignores the statutorily established time frames.

Section 40.1(a) states:

> "In making its orders and determinations under this Section, the Board shall include in its consideration the written decision and reasons for the decision of the county board, . . . the transcribed record of the hearing held pursuant to subsection (d) of Section 39.2, and the fundamental fairness of the procedures used by the county board . . . in reaching its decision."

As stated clearly in Section 40.1(a), the Board's review of the fundamental fairness of the proceedings below is not limited by the pleadings of the parties. The Board can review all aspects of the county board's decision-making process to determine if it was fundamentally fair. In Waste Management of Illinois, Inc. v. Pollution Control Board, 175 Ill.App.3d 1023, 530 N.E.2d 682 (Ill.App. 2 Dist 1988), the court described the

principles of fundamental fairness in a county board's ruling on a site location suitability application. The court stated:

> "In an administrative hearing, due process is satisfied by procedures that are suitable for the nature of the determination to be made and that conform to the fundamental principles of justice. [Citation.] * * * Due process requirements are determined by balancing the weight of the individual's interest against society's interest in effective and efficient governmental operation."

In reviewing the record before it in PCB 90-216, the Board discovered that the MCB lacked an understanding of what was required to satisfy the Act and case law when taking final action. The confusion surrounding the vote resulted in five of the criteria not being determined by the MCB, an unsuitable outcome considering the nature of the proceedings. (R. at C3563-3574.) The Board, in its February 28, 1991 Opinion and Order, discussed the case law establishing that the Act requires a finding by the county board on each of the criteria. For reasons of judicial economy and efficiency, the appellate court has held that the Board must review all contested criteria. See, E&E Hauling v, IPCB, 116 Ill.App.3d 586, 451 N.E.2d 555 (Ill.App. 2 Dist. 1983), aff'd 107 Ill.2d 33, 481 N.E.2d 664 (1985); Waste Management v. Pollution Control Board, 175 Ill.App.3d 1023, 530 N.E.2d 682 (Ill.App. 2 Dist. 1988). The Board applied this reasoning to the present situation and decided that a remand to the MCB was necessary to achieve fundamental fairness for all participants at the county level and to allow the Board to satisfy its obligation to review all contested criteria.

CQR argues that a remand order is an "end-run around clear statutory and jurisdictional deadlines". The courts have recognized that a remand order of the Board is an appropriate order in a review of a site location suitability matter. In City of Rockford v. County of Winnebago, 186 Ill.App.3d 303, 542 N.E.2d 423 (Ill.App. 2 Dist. 1989), the court stated that a remand order "is certainly an appropriate order . . . where the PCB determined that fundamental fairness required supplemental proceedings." The Board's remand Order was based upon the considerations enumerated in Section 40.1 of the Act and was intended to serve the interests of all the participants in the site location suitability approval process

The Board again finds that it had the statutory authority to remand this matter for supplemental proceedings to correct the fundamental unfairness in the proceedings. The Act and the case law discussed establish that the Board is obligated to consider and rule upon the fairness of the procedures below. Where those procedures are fundamentally unfair, the Board is empowered to remand the matter consistent with statutory deadlines. See, City of Rockford v. County of Winnebago, 186 Ill.App.3d 303, 542 N.E.2d 423 (Ill.App. 2 Dist. 1989); John Ash Sr. v. Iroquois

County Board, No. 3-88-0376, non-published, (Ill.App.3 Dist. 1989); and McHenryCounty Landfill v. County of McHenry, 154 Ill.App.3d 89, 506 N.E.2d 372 (Ill.App. 2 Dist. 1987). For these reasons, the Board finds that it does have jurisdiction over this matter.

SECTION 39.2(e) - DECISION IN WRITING

CQR's Support Statement contends that its application has been approved by operation of law because the MCB did not issue its decision in written form within the statutory timeframe as required by Section 39.2(e) of the Act. Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1039.2(e). In support of this contention, CQR argues that there is case law on this issue which supports the outcome of approval by operation of law. In addition, CQR argues that it raised this issue before the Board immediately despite the ambiguous situation the MCB's actions created.

Section 39.2(e) provides:

> "Decisions of the county board . . . are to be in writing, specifying the reasons for the decision, such reasons to be in conformance with subsection (a) of this Section. In granting approval for a site the county board . . . may impose such conditions as may be reasonable and necessary. Such decision shall be available for public inspection at the office of the county board. If there is no final action by the county board . . . within 180 days after filing of the request for site approval the applicant may deem the request approved."

CQR contends that Waste Management of Illinois, Inc. v. Illinois Pollution Control Board, 201 Ill.App.3d 614, 558 N.E.2d 1295 (Ill.App. 1 Dist. 1990) (hereinafter "Waste Management 1990") supports its argument that its application is approved by operation of law because the MCB did not issue a written final decision within 180 days of filing of the application as required by the Act. The many distinguishing factors between the cited case and the present matter preclude Waste Management 1990 from being dispositive of the present matter.

The relevant facts in Waste Management 1990 are that on appeal from the county board's denial of site application approval, the Board voted on and issued a final Order affirming the denial within its 120-day statutory deadline. Waste Management of Illinois, Inc. v. Village of Bensenville, PCB 89-28, 101 PCB 73, July 13, 1989 (Order); 102 PCB 25, August 10, 1989 (Opinion). Over twenty five days later, the Board voted on and issued a final Opinion containing the facts and reasoning for the decision to affirm the county board's denial. The First District Appellate Court found that the application was approved by operation of law for two reasons. The court concluded that the Board Order was not a final action within the 120-day

statutory deadline because a) it provided that the time for filing motions for reconsideration was tolled until after the later Opinion was issued and b) because it did not set forth the facts and reasons for the Board's decision. The court found that these facts respectively indicated that the later issued Opinion was the final action, reviewable by the court, and that the earlier issued Order circumvented the applicant's right to review of an administrative order since a court would not have the information necessary for a complete and fair review of the decision at the time of agency action. Therefore, the court held that the Board did not meet its 120-day statutory deadline.

The court also focussed on the circumstances surrounding adoption of the later issued Opinion in concluding that the application was approved by operation of law. The court noted that the Board's Order did not contain any information on the basis for the Board's decision affirming the county board's denial,. However, the later issued Opinion not only contained the facts and reasons for the denial but also voted on the proposed Opinion affirming the county. The court found that the later issued Opinion constituted a "material and substantive modification" of the earlier Order. Waste Management 1990, 201 Ill.App.3d 614, 558 N.E.2d 1295 (Ill.App. 1 Dist. 1990)

The facts of the present matter are different from the facts in Waste Management 1990. The MCB voted to deny the application within the 180-day statutory deadline. CQR attempts to equate this action with the Order issued by the Board in Waste Management 1990. However, the MCB's action articulated the statutory basis of the MCB's determination by enumerating which criteria of Section 39.2(a) were not met by CQR and why CQR had not met the criteria as was required by the Act. The Board's Order in Waste Management 1990 contained no such articulation. Another distinguishing factor is that the MCB's action within the 180-day statutory deadline was the final determinative action on CQR's application. Unlike Waste Management 1990, the MCB took no further action as an administrative body to determine the status of CQR's application after October 11, 1990. The Notice of Decision issued after the 180-day deadline was not a "material and substantive modification" of the final action taken within the deadline. In fact, the Notice of the MCB's decision contained the exact same language as the Motion to Deny for criteria 1 and 3 of Section 39.2(a). R. at C1886.

This matter is finally distinguishable from Waste Management 1990 in that the MCB's action taken within the 180 days was appealable to the Board as required by the Act. The concern in Waste Management 1990 that the right to review was circumvented is not applicable here. The MCB's final action was communicated to CQR with the reasoning for the MCB's decision. CQR was able to file an informed Petition for Review and present its arguments based on the MCB's decision at the Board hearing. Therefore, the rationale of Waste Management1990 does not apply here and that case is not dispositive.

CQR argues that it is the October 29, 1990 Notice of the MCB's decision which constitutes final written decision of the MCB. The Notice states that disapproval of the application occurred on October 11, 1990, lists the criteria not satisfied, and is signed by the attorney for the MCB. R. at C1886. The Notice does not differ in substance from the Motion to Deny, and in fact, contains the identical language of the reasons for denying criteria 1 and 3 as the Motion to Deny. In response, MCB argues in its Brief that a final action, as required by the statute, need only be sufficient to justify an appeal to the Board and need not be a written decision served on the applicant within 180 days.

The Board does not agree with the interpretation of Section 39.2(e) proposed by CQR. CQR has combined two separate and distinct phrases which are used in this section; "decision in writing" and "final action". The distinction denotes two related but different functions. The separation is further emphasized by the placement of these functions into different sentences. Only a "final action" is required to fulfill the statutory time limit. The language of Section 39.2(e) allows a county board 180 days after the filing of an application to consider the completeness of the application, conduct the necessary hearings and to consider the merits and evidence of the record. Final action, whether approval, disapproval or inaction, must be taken within that 180-day period and can be made in the final hour of that time period. The Act does not require that circulation of the written decision of the county board specifying the reasons for the decision be accomplished within 180 days.

CQR's argument that the MCB's failure to issue a written decision within the 180-day deadline created an unfavorable and ambiguous situation is without merit due to the Board's finding above and because of evidence provided by the MCB in the form of a copy of a fax. The copy of the "fax" was attached as Exhibit A to Respondent's Brief. The heading on the fax is "Oct 15 '90 08:52 CENT. ST. ENV. SERV.". The fax is a copy of the Motion to Deny on which the MCB voted on October 11, 1990. The MCB states that after the meeting, Counsel for the MCB gave his copy of the Motion to the representative for CQR and requested that the copy be faxed back to him. The copy was faxed from CQR's parent company, Central States Environmental Services.[2] The Motion to Deny recites each of the criteria from Section 39.2(a) and then cites the reason for finding that criteria was satisfied or not

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[2] The first page of CQR's Application describes Central States Environmental Services, Inc. as owning more than 10% of the capital stock of CQR and as having identical street addresses and registered agents with CQR. In addition, the officers, directors and stockholders of Central Environmental Services, Inc. are also officers, directors and/or stockholders in CQR. Rec. at C0004.

satisfied by CQR.[3]

CQR's further claims that the absence of a written decision within the 180-day statutory deadline created an unfavorable and ambiguous situation because CQR believed that the application was approved by operation of law and did not know how to have an application approved by law formally. The Board finds this argument unmeritorious since despite CQR's supposed certainty that the application was approved by operation of law, CQR failed to raise any claim of the untimeliness of the MCB's decision in it's Petition for Review. In fact CQR did not raise this issue until three months after filing the petition for review and four months after the MCB's decision.

The facts of this matter clearly indicate that the MCB took final action denying the request for site approval within 180 days of the filing of the application. Subsequently, CQR was apprised in writing of the voted decision and of the reasoning for the decision within four days after the MCB took final action. Unlike the situation in Waste Management 1990, the written decision did not alter the MCB's final action and the written decision was issued in a timely manner for purposes of review. Consequently, CQR's ability and right to petition for review were not impaired by the issuance of the written Notice of Decision after the 180-day deadline. For the foregoing reasons, the Board finds that the application was not approved by operation of law.

As a final note, the Board will address CQR's assertions that CQR filed a Petition for Review with this Board in November of 1990 challenging the October 29, 1990, 'decision' of the MCB, not challenging the fundamental fairness of the proceedings, and which "should in no way be construed as an acceptance of the MCB's belated action." In actuality CQR's Petition for Review states that CQR "requests a hearing to contest the decision of the Marion County Board dated October 11, 1990. The Petitioner believes that . . . the Marion County Board's decision is against the manifest weight of the evidence admitted during the siting hearing and is fundamentally unfair." Contrary to CQR's assertion, its original Petition for Review challenged not only the procedures followed by the MCB, but also the substance of the MCB's denial of the application.

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[3] In addition, four affidavits, two from attorneys, attached to the Joint ACB attest to the presence of CQR representative Douglas Shook outside of the October 11, 1990 meeting of the MCB. A newspaper photo from Tuesday, July 17, 1990, attached to an affidavit, identifies Douglas Shook as seated next to the attorney for CQR at the CQR table during the hearings before the MCB.

FUNDAMENTAL FAIRNESS

CQR's Support Statement contends that the remand order has now produced fundamental unfairness in the proceedings by reopening the matter before the MCB and circumventing the statutory time limits. In support of its first contention CQR argues that the MCB's vote on remand is fundamentally unfair because elections were held during the pendancy of the Board's review. Consequently, five newly elected MCB members voted on remand. CQR contends that these members are ineligible to vote on the remaining criteria because they did not have an "opportunity to assess the credibility of a witness and perceive their demeanor while testifying". In addition, CQR maintains that this case was pivotal to the elections with some new members running "principally on the platform of opposition to the proposed facility."

The Board notes that it is not individuals but the governmental body that is making the decision. Also, the record for the proceedings was available to all members, including the newly elected members. City of Rockford v. County of Winnebago, 186 Ill.App.3d 303, 542 N.E.2d 523 (Ill.App. 2d Dist. 1989). Finally, the courts have stated that an administrative official who has taken a public position or expressed strong views on an issue before the administrative agency does not overcome the presumption that the official is objective and capable of fairly judging a particular controversy. A.R.F. Landfill v. Pollution Control Board, 174 Ill.App.3d 82, 528 N.E.2d 390 (Ill.App. 2 Dist. 1988); Waste Management of Illinois, Inc. v. Pollution Control Board, 175 Ill.App.3d 1023, 530 N.E.2d 682 (Ill.App. 2 Dist. 1988).

CQR also argues that the Board introduced fundamental unfairness by not considering those criteria not specifically decided against by the MCB as approved by the MCB. The MCB transcripts in PCB 90-216 reveal a great deal of confusion surrounding the county board's duty to vote on all criteria. R. at C3566-3576. In addition, the transcript does not indicate which of the criteria would have received a yea or nay vote from the MCB. The Board, under these circumstances, could not assume which way the MCB would have voted on the criteria.

The Board has already discussed the appropriateness and timeliness of a remand order in site location suitability matters. (Page 5.) Therefore, for the reasons discussed above, the Board rejects CQR's claim of fundamental unfairness.

STATUTORY CRITERIA

Section 39.2 of the Act presently outlines nine criteria for site location suitability, each of which must be satisfied (if applicable) if site approval is to be granted. Ill. Rev. Stat.

1989, ch. 111 1/2, par. 1039.2. In establishing each of the criteria, the applicant's burden of proof before the local authority is the preponderance of the evidence standard. Industrial Salvage v. County of Marion, PCB 83-173, 59 PCB 233, 235, 236, August 2, 1984. On appeal, the Board must review each of the challenged criteria based upon the manifest weight of the evidence standard. See, Waste Management of Illinois, Inc. v. IPCB, 122 Ill.App.3d 639, 461 N.E.2d 542, (Ill.App. 3 Dist. 1984). This means that the Board must affirm the decision of the local governing body unless that decision is clearly contrary to the manifest weight of the evidence, regardless of whether the local board might have reasonably reached a different conclusion. See E&E Hauling v. IPCB, 116 Ill.App.3d 586, 451 N.E.2d 555 (Ill.App. 2 Dist. 1983), aff'd 107 Ill.2d 33, 481 N.E.2d 664 (1985); City of Rockford v. IPCB and Frink's Industrial Waste, 125 Ill.App.3d 384, 465 N.E.2d 996 (Ill.App. 2 Dist. 1984); Steinberg v. Petta, 139 Ill.App.3d 503, 487 N.E.2d 1064 (Ill.App.1 Dist. 1985); Willowbrook Motel v. PCB, 1435 Ill.App.2d 343, 491 N.E.2d 1032 (Ill.App. 1 Dist. 1985); Fairview Area Task Force v. Village of Fairview, PCB 89-33, June 22, 1989.

The Board has before it two determinations from the Marion County Board; one from October 11, 1991 deciding criteria 1 and 3 and supplying reasons for the decision, and two, from March 26, 1991 with a vote on each of the applicable criteria and no supporting reasons. The Board notes that its remand order of February 28, 1991 ordered the MCB to make final determinations only on the remaining applicable criteria of Section 39.2(a). CQR has not specifically contested the MCB decision on criteria 2, 5, 6 and 7,[4] although its Limited Appearance does refer to itself as a Petition for Review to preserve CQR's rights. The Board will review the MCB's decision and reasons for decision on criteria 1 and 3. Regarding the MCB's decision for criteria 2, 5, 6, and 7, the Board will also review these but notes that CQR has failed to argue the merits of the MCB's decision on these criteria.

The county board record is highly developed due to the active participation of the applicant, the MCB, and several individuals and groups opposed to the siting of the facility. These individuals and groups will be referred to collectively as the "opponents" for the remainder of this Opinion, unless qualification is necessary. The MCB, CQR, and the opponents all presented witnesses to support their positions. Most of these witnesses were cross-examined by at least two attorneys and sometimes up to four.

The Board hearing in PCB 90-216 is likewise well developed due to the participation of the MCB, CQR, and the opponents. The Board hearing in the present docket, PCB 91-72, is much less informative because CQR did not appear.

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[4] The MCB found in favor of CQR on criterion 4.

<u>Criterion 1: The facility is necessary to accommodate the waste needs of the area it is intended to serve.</u>

The MCB decided against CQR as to criterion 1. The reason stated in the Motion to Deny was that,

> "Marion County produces only enough hazardous waste of <u>all types</u> (heavy and dilute concentrations) to operate a facility like CQR's proposed facility for ten days. The great majority of the waste to be imported from outside of Marion County from a four-state area."

Pursuant to Section 39.2(a)(1) of the Act, the MCB is required to review CQR's application to ensure that the proposed facility is necessary to accommodate the waste needs of the area it is intended to serve. It is the applicant who defines the intended area to be served. <u>Metropolitan Waste Systems, Inc., Spicer, Inc., et al. v. IPCB</u>, 558 N.E.2d 785 (Ill.App. 3 Dist. 1990).

CQR's Application states that

> "The area intended to be served by the facility is a regional area and not a county or multi-county area. * * * The need for this facility is not an independent need for Marion County alone, but a regional need for Southern Illinois.. * * * There are no commercial facilities in Southern Illinois that provide the same or similar services as proposed by CQR."

R. at C00010-C00012.

The MCB maintains that no intended service area was ever clearly defined. In support of its argument, MCB states that the intended service area was described during the MCB hearings as "the bottom sixty four counties", and by one witness as having a market area of within a 150 to 200 mile radius which includes four states. R. at C2938 and C2120-2121. Also, a Needs Assessment for Clean Quality Resources, Inc., prepared by an environmental engineering firm, states that no similar facilities operate south of Peoria, Illinois. R. at C3674. This report also refers to a list of counties contained in Appendix A as being the 'downstate Illinois service area" . R. at C3687.

CQR's application states that the facility will treat the following wastewaters; corrosive wastewaters, metal contaminated wastewaters, oily and petroleum wastewaters, reactive wastewaters, wastewaters contaminated with solvents, wastewaters contaminated with organics, and landfill leachates. R. at C00013. CQR presented the testimony of Greg Kugler, who prepared the Needs Assessment Report for CQR (CQR Exhibit 13), in support of the need for the proposed facility in the intended service area. Mr. Kugler testified that there is not a treatment facility capable of handling the wastewater streams proposed in

the intended service area. He also testified that a significant portion of the facility's capacity would be necessary when new regulations were adopted that required greater remedial efforts and treatment of more types of contaminated waters. R. at C2921-C2946.

The opponents cross-examined Mr. Kugler's testimony and Needs Assessments Report extensively. R. at C2944-3024. Specifically, the opponents questioned Mr. Kugler's direct testimony on needs based on future regulations, and the actual current needs of the intended service area. R. at C2963 and C2971-C2972. In addition, one of the opponents, Residents for Environmental Safety, presented its own witness, Mr. John Thompson who testified that the content and requirements of the proposed or pending regulations indicated that there would not be a future need for the proposed facility. R. at C3174-3180.

Despite the varied phrases used to describe the intended service area, it is clear from CQR's application and from the import of the descriptive phrases that the service area is greater than Marion County alone. The MCB does not have the authority to restrict the intended service area to Marion County or to reject the intended service area as too big. <u>Metropolitan Waste Systems, Inc., Spicer, Inc., et al. v. IPCB</u>, 558 N.E.2d 785 (Ill.App. 3 Dist. 1990).

Conflicting evidence was presented at hearing. However, the MCB's decision is not against the manifest weight of the evidence merely because the Board could draw different inferences and conclusions from this conflicting testimony. <u>Steinberg v. Petta</u>, 139 Ill.App.3d 503, 508, 487 N.E.2d 1064 (Ill.App.1 Dist. 1985). Sufficient evidence exists in the record for the MCB to conclude that the need criteria was not satisfied by CQR. Therefore, the Board finds that the MCB's decision that CQR did not prove that there was a need for its facility is not against the manifest weight of the evidence. The Board affirms the decision of the Marion County Board as to Criterion 1 of Section 39.2(a) of the Act.

<u>Criterion 3: The facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property.</u>

The MCB decided against CQR as to criterion 3. The reason stated in the Motion to Deny was that,

> "Facility will cause property values throughout Marion County to decline, on Walnut Hill Road to decline as much as 50%, and property immediately adjacent to the site will have virtually no value at all."

Criteria 3 does not require that the effects of the proposed facility on the character and value of the surrounding property be eliminated but that those effects be minimized. <u>Clutts v.</u>

Beasley, 185 Ill.App.3d 543, 541 N.E.2d 844 (Ill. App. 5 Dist. 1989). It is the duty of the applicant to demonstrate that it will take reasonably feasible steps to minimize incompatibility and negative effects on the surrounding area. Waste Management of Illinois, Inc. v. PCB, 123 Ill.App.3d 1075, 463 N.E.2d 969 (Ill.App. 2 Dist. 1984).

The facility proposed by CQR could handle low level hazardous waste. The treatment processes are enclosed and the building is to have exterior landscaping, curbing, paved entrances and a lawn separating the building from the road. At hearings, the MCB heard the testimony of CQR's witness, John Stoddard, and the opponents witness, Virgil T. Bailey, both involved in real estate. Mr. Stoddard testified that the character of the surrounding area was agricultural with a definite trend toward light industry. R. at C2603-2608. Mr. Bailey testified that the character of the surrounding area was for many years residential. R. at C3045. The MCB also heard from several residents of the immediate area surrounding the proposed site who believed the proposed facility would be incompatible with their area. R. at C3142, C3065, and C3087.

Mr. Stoddard and Mr. Bailey also testified to the effect on the value of the surrounding property. Mr. Stoddard testified that the property values would remain unchanged or could be increased due to the improvements to the road proposed by CQR (C2612-2616). Mr. Bailey testified that a facility handling any type of hazardous waste would substantially decrease the value of the surrounding property. R. at C3044, C3048. The MCB also heard from a would-have-been-resident of the immediate area surrounding the proposed site who forfeited his earnest money upon learning that the facility was being sited near his future home. R. at C3061-3064.

The reason cited by the MCB for finding against CQR on criteria 3 is an improper basis for determining that an applicant has failed to meet this criteria. CQR is only required to take reasonable efforts to minimize the effect of the facility on the values of the surrounding property. Therefore, for the MCB to base its decision solely on evidence that the facility will affect property values is improper. Clutts v Beasley, 185 Ill.App.3d 543, 541 N.E.2d 844 (Ill. App. 5 Dist. 1989).

After reviewing the record, the Board finds that CQR presented sufficient evidence to demonstrate that its facility was located to minimize incompatibility with the surrounding area. The facility will be housed in a new building complete with landscaping. Unlike a landfill, there is no concern here for unsightliness or vertical changes in the landscape. Therefore, because the record establishes that the facility will minimize both incompatibility with and the effect on the value of the surrounding property, the Board finds that the decision of the Marion County Board as to criterion 3 of Section 39.2(a) of the Act is against the manifest weight of the evidence.

Criterion 2: The facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected.

Criterion 5: The plan of operation for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents.

Criterion 6: The traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows.

Criterion 7: If the facility will be treating, storing or disposing of hazardous waste, an emergency response plan exists for the facility which includes notification, containment and evacuation procedures to be used in case of an accidental release.

The Board's review concerning criteria 2 revealed that CQR presented several witnesses that testified on topics relating to the protection of the public health, safety and welfare. Engineers Marvin Jenkins and Jack Bass discussed the complex measures proposed for drainage of the effluent from the facility. R. at C2721-C2734 and C2735-C2757 respectively. CQR also presented the testimony of Tim Holcomb, a professional engineer, concerning the soil and foundation characteristics of the proposed site. R. at C2555. All were cross-examined.

The opponents also presented several witnesses on this criteria. John Thompson, executive director of a non-profit environmental group, and Shany Zasnaghlun, an engineer with the Army Corp. of Engineers, discussed their concerns with the indefiniteness of certain aspects of CQR's proposed facility. R. at C3163-3172 and C3225-C3239. Dr. Ashok Patel, practicing in occupational and environmental health, and Dr. Ed Pulver, a biologist, testified on the effects of contaminants if released into the environment. R. at C3098-C3118 and C3293-C3299.

As for criteria 5, James Huff, a consulting engineer and witness for the MCB, stated his concerns about inadequacies in CQR's plans to minimize the danger to the surrounding area. R. at C2210, C2224, C2229, C2255-2262. John Thompson also addressed certain perceived failures to minimize danger. R. at C3170.

CQR presented the testimony of its President David Pritchard and Vice-President Phil Sutton on the design of traffic patterns pursuant to criteria 6 and the existence of an emergency plan required by criteria 7. Both of these witnesses were extensively cross-examined to the point where the MCB could reasonably have doubted the dependability of certain of their information. R. at C2370-C2377, C2453-C2460, and C2492-C2494.

CQR did not argue the merits of the MCB's determinations on criteria 2, 5, 6, and 7. The record establishes that the MCB had before it sufficient evidence to decide that CQR failed to meet

its burden on these criteria. The Board finds that the Marion County Board's determinations on criteria 2, 5, 6, and 7 of Section 39.2 of the Act are not against the manifest weight of the evidence.

CONCLUSION

For the above stated reasons, the Board affirms the decision of the Marion County Board denying approval to Clean Quality Resources, Inc. for a new regional pollution control facility on the bases of the statutory requirements of Section 39.2(a)(1), (2), (5), (6) and (7) of the Act. The Board reverses the Marion County Board on Criterion 3.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

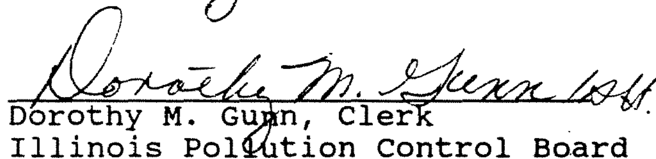
The Board hereby affirms the decision of the Marion County Board denying site location suitability approval for a new regional pollution control facility.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

Board Member J. D. Dumelle concurs.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 26th day of August, 1991, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board