ILLINOIS POLLUTION CONTROL BOARD
February 22, 1984

INDUSTRIAL SALVAGE, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 83-173
	)	
COUNTY BOARD OF MARION,	)	
	)	
Respondent.	)	

JOHN D. LACKEY, ESQ. (LACKEY, WARNER & SAUER) APPEARED ON BEHALF OF INDUSTRIAL SALVAGE, PETITIONER;

MICHAEL R. JONES, ESQ. (BRANSON, JONES & BRANSON) APPEARED ON BEHALF OF SHIRLEY WATSON;

THE HONORABLE ROBERT W. MATOUSCH (STATE'S ATTORNEY) APPEARED ON BEHALF OF MARION COUNTY, RESPONDENT.

OPINION AND ORDER OF THE BOARD (by B. Forcade):

This matter comes to the Board on a November 21, 1983 Petition by Industrial Salvage, Inc. ("Industrial") seeking review of a decision of the County Board of Marion County ("Marion") denying site location suitability approval for Industrial's regional pollution control facility. On December 1, 1983 the Board ordered Marion to file the record below, which was filed on December 29, 1983. On January 11, 1984, Shirley Watson ("Watson") filed a motion for leave to appear, which was granted by Board Order of January 12, 1984. On January 25, 1984, Watson filed a response in the nature of an answer, to Industrial's Petition. The Board hearing was held February 2, 1984,* at which time Industrial tendered its brief. All responsive briefs were due by February 7, 1984, however none were filed.

Industrial filed a Request for Site Approval with Marion on July 19, 1983. That request sought approval for a 40 acre addition adjacent to Industrial's current facility on Perrine Avenue in

---

*No exhibits were offered at this hearing except prior Board Opinions to support legal theories. Therefore all subsequent references to Exhibits in this Opinion will be to Industrial's Exhibits #1-15 (Pet. Ex.) and Objectors Exhibits #1-4 (Obj. Ex.) as introduced at the Marion Hearing September 13, 1983, or to Documents #1-22 (Doc.) as listed in the Marion Certificate of Record on Appeal.

Centralia, Illinois. Neither the existing nor the proposed facility would accept hazardous waste. The old City landfill, which was closed in 1972, is North and East of the proposed facility. Industrial's existing facility is to the West, and a large wooded area without residences or structures is to the South. From July 14 through September 13, 1983 Marion received 17 letters, objections, appearances or citizen petitions commenting on this matter. Marion's public hearing was held September 13, 1983. On October 11, 1983, Marion denied site approval by a vote of 15 to 0. Marion issued a written decision on November 8, 1983, containing the following findings:

1. The proposed regional pollution control facility is not urgently necessary at this time to accomodate the waste needs of the area it is intended to serve.

2. The facility is not proposed to be operated in a manner consistent with the protection of the public health, safety and welfare. The history of the applicant's operation of his existing regional pollution control facility indicates numerous and continuous violations of E.P.A. regulations. No evidence was presented by applicant to indicate that the new pollution control facility would be operated in a manner consistent with E.P.A regulations.

On review, Industrial urges that Marion's finding the proposed facility was "not urgently necessary", conflicts with E & E Hauling Inc. v. Pollution Control Board, et. al., 71 Ill. Dec. 587, 451 N.E.2d 555 (2nd District, 1983), is contrary to the evidence, and must be reversed. Additionally, Industrial urges that finding #2 must be set aside in that it did not consider "site" suitability but "applicant" suitability, which is beyond Marion's authority and relied on improper evidence. Marion and Watson urge this Board to affirm the decision below.

The Marion decision to deny was based on criterion #1 and #2 of Section 39.2(a) of the Environmental Protection Act ("Act"), which provides:

> The county board of the county or the governing body of the municipality, as determined by paragraph (c) of Section 39 of this Act, shall approve the site location suitability for such new regional pollution control facility only in accordance with the following criteria:
>
> 1. the facility is necessary to accomodate the waste needs of the area it is intended to serve;
>
> 2. the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;

Fundamental Fairness

As a preliminary matter, Section 40.1(a) of the Act requires the Board to consider the fundamental fairness of the procedures used by the County Board. Since the Marion hearing did not provide an opportunity for cross-examination, the Board finds that Marion's procedures were not fundamentally fair. As explained below, fundamental fairness requires County Board procedures to afford adjudicative due process to the participants, and adjudicative due process requires an opportunity for cross-examination.

In E & E Hauling, Inc. v. Pollution Control Board, et. al., 71 Ill. Dec. 587, 451 N.E.2d 555 (1983), the Second District addressed the procedural requirements that apply to County Board determinations regarding site suitability. After rejecting a claim of constitutional due process for such proceedings, the Second District held that the words "fundamental fairness" create a statutory due process standard for such proceedings. Having found due process to apply, the court proceeded to explain the two types of due process (adjudicative and rule-making) and determine which applies to County Board determinations. In so doing the Second Circuit equated County Board site suitability determinations with this Board's determinations on variances.

> While the line between adjudication and rule making "may not always be a bright one", the basic distinction is one "between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other." (United States v. Florida East Coast Railway Company, 410 U.S. 224, 245, 35 L. Ed. 223, 239, 93 S. Ct. 810, 821 (1973).) Under Section 39.2 the Board's decision on the grant or denial of a permit turns on its resolution of disputed fact issues, whether the particular landfill, or expansion, for which the permit is sought meets the specific factual criteria set out in section 39.2 of the Act. The facts that the Board relies on are developed primarily by the immediate parties rather than acquired through the Board's own expertise.
>
> Our supreme court has held that the decision whether to grant a variance from an environmental regulation is quasi-adjudicatory, although the imposition of conditions on the variance is rule making. (Monsanto v. Pollution Control Board, 67 Ill.2d 276, 289-90 (1977). See also Environmental Protection Agency v. PCB, 86 Ill.2d 390, 400 (1981); Willowbrook Dev. Corp. v. Pollution Control Board, 92 Ill. App.3d

> 1074, 1081-82 (1981).) As the factual criteria involved in the County Board's decision under Section 39.2 are not substantially broader than those in the statutes involved in the above-cited cases, we adopt a similar rule here. (Slip Op. at 17-18).

At the beginning of the Marion Public Hearing, the hearing officer announced "There will be no cross-examining anyone by any of the attorneys present" (Marion R. 4). No cross-examination occurred from the attorneys and no questioning by the public was allowed.

It is well established that adjudicative due process, and this Board's determinations on variances, require an opportunity for cross-examination (North Shore Sanitary District v. Pollution Control Board, 2 Ill. App.3d 797, at 801 (2nd Dist., 1972); Garces v. Dept. of Reg. & Education, 118 Ill. App.2d 206, at 224 (1969); Smith v. Dept. of Reg. & Education, 412 Ill. 332, at 348 (1952)).

In SB 172 proceedings, the potential for third party appeal must also be considered. Sections 39.2(f) and 40.1(b) of the Act are silent as to how, procedurally, a member of the public must participate at the County hearing in order to assure access to prospective third party appeal rights. The Act does not require members of the public, singly or together, to hire an attorney or otherwise to file "appearances" at the County public hearing as a pre-condition for asserting third party appeal rights. Additionally, the Act, and this Board's regulations, generally recognize public participation rights in environmental matters. The Board therefore, finds that the County hearing must reasonably provide for the members of the public to ask questions and make statements in order to preserve potential third party appeal rights.

Since Marion did not provide an opportunity for cross-examination, its procedures were not fundamentally fair. Therefore, the Board will not reach the other issues in this case.

Remand for Further Proceedings

In City of East Peoria v. Pollution Control Board, 117 Ill. App.3d 673, 452 N.E.2d 1378 (1983) the Third District stated the obligations for review of adjudicatory proceedings:

> Our first duty in considering a complaint for administrative review is to determine if the inferior tribunal applied the proper test to record before it. (Board of Education of Minooka v. Ingels, (1979), 75 Ill. App.3d 335, 31 Ill. Dec. 153, 394 N.E.2d 69.) Where, as here, the inferior tribunal applied the wrong standard of review to the evidence, the resulting finding is invalid, and there is no valid order subject

> to administrative review. (Board of Education of Minooka v. Ingels.) And, where there is no valid order subject to our review, we are forced to remand the matter to the inferior tribunal so that it might reconsider its decision in light of the appropriate standard. Board of Education of Minooka v. Ingels.

Here, the Board has determined that the procedure below was fundamentally unfair. Thus, there is no valid order subject to review. The Board therefore remands this case to Marion for an additional hearing pursuant to Section 39.2(d) to cure this procedural defect.

The Board construes this remand order as restarting the hearing and decision timeclocks of Section 39.2 (d-e).

ORDER

The decision of the Marion County Board is invalid and this case is remanded to the Marion County Board for further proceedings consistent with the foregoing Opinion.

IT IS SO ORDERED.

Board Member J. T. Meyer dissented.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 22nd day of February, 1984 by a vote of 6-1.

Christan L. Moffett, Clerk
Illinois Pollution Control Board