ILLINOIS POLLUTION CONTROL BOARD
August 2, 1984

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

DISSENTING OPINION (by J. Anderson and J. T. Meyer):

We dissent because, for a number of reasons, we believe the Board erroneously upheld the County's decision on Criterion #1, whether "the facility is necessary to accomodate the waste needs of the area it is intended to serve" (Ill. Rev. Stat. ch. 111½ §1039.2(a)1. We believe that the Board's review of the record was faulty and misfocused, and that its evidentiary expectations and its reasoning seriously erode its prior balanced approach to interpreting Criterion #1.

The key issue is whether it is clearly apparent, under the manifest weight standard, that Industrial Salvage (Industrial) sufficiently showed that the facility was necessary in terms of the waste production and waste disposal capabilities of certainly a major component of the "area intended to be served". Even apart from the dependence of isolated areas like Walnut Hill and Kinmundy on the landfill, the Board failed to acknowledge testimony that a) Industrial is the only existing facility disposing of the Centralia area general refuse (A-R 130, C-62) and b) there is no other existing site able to "pick up the slack" (C-R 59, 60, 62, 65)*, which the citizens acknowledged this under cross-questioning when giving sworn testimony at the second County hearing (C-R 70-110).

Lack of detail in discussing transportation costs to alternate sites is not an important component of this case, where the basic assertion is that there are no alternate sites with sufficient capacity to take the 85% of Industrials's volume coming from the Centralia area. In the prior case quoted by the Board, there were a number of alternate sites (Board Opinion p. 7).

Since Industrial handled 100% of the Centralia area general refuse, which was quantified (A-R 12), it logically follows that

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*Prior's assertions were not based only on hearsay, but on having driven by and seen the places."

the general refuse waste production of the Centrlia area was known . The issue then becomes how to consider other "waste disposal capabilities". The testimony and admissions in this record show that only two "options" regarding waste disposal capabilities for the Centralia area's general refuse were presented, both of which we believe were unacceptable "options" to consider unde. Criterion #1:

Option 1. A landfill or landfills that may come about in the future, particularly a Tri-County landfill at a different location and with a different operator, and;

Option 2. Use as a non-regional landfill of the replacement 40 acre landfill (25 acres for actual operation) for which Industrial is seeking SB 172 approval. After the County's first denial, Industrial sought and received a development permit from the Agency without an SB 172 approval, thus allowing the use of the landfill only as a non-regional facility, i.e. for waste coming only from the unincorporated area of Marion County. Industrial testified that, if the landfill, because of delay in, or lack of, SB 172 approval, could not operate as a full regional pollution control facility, that it could be used to lengthen the life of the present facility by identifying and separating out the waste from unincorporated areas in the County for disposal only at the non-regional facility. The existing facility, under this arrangement, might be kept open for seven to nine years rather than somewhere between one and four years.

These options are discussed below.

OPTION I

Here it should be pointed out that Industrial filed its application on July 19, 1983. In its original October 1983 denial, the County inserted the words "urgently" and "at this time" to the statutory language of Criterion #1. When the County again denied approval after a hearing on remand caused through no fault of the applicant, the County again included the disclaimer that the proposed site was not necessary "at this time," dropping the word "urgently". The County obviously gave meaning to these words. The Applicant had argued the discrepancies after the first hearing. We fear that the Board, by noting but not addressing the use of these words, may have left the impression that it had no problem with the probable context in which the County was using them.

In refusing to approve Industrial, the County obviously did not want to preclude the opportunity to approve an alternate facility at another location in the near future. The Board should have made clear that, if such was the County's intention, this is an unacceptable consideration in an SB172 proceeding (as

it similarly held on Criteria #2). Sec. 39.2(f) precludes the County from directly or indirectly applying local zoning and land use requirements. The suitability of the site location must go up or down on its own merits within the confines of the SB 172 provisions, not within a comprehensive planning framework. Mr. Prior, operator of Industrial, himself pinpointed the issue of speculative disposal capabilities at the second hearing when he stated that at the present time there was no place now for incorporated and unincorporated Centralia to take their trash, but he didn't know if there "would be [another site in] one year, two years or three years down the road". (C-R 62.) When this Board and the Appellate Courts, (and particularly the Third District,) addressed the availability of alternate waste disposal capabilities in the context of "necessary", we and they did not include prospective sites that are a non-existent "gleam in the eye." Waste Mgt. of Ill., Inc. v. PCB et al, No. 3-83-0325 and 3-83-0339, Cons., 3rd Dist, Mar. 9, 1983 (see esp. slip op at p. 4-6), and Waste Mgt. of Ill., Inc. V. PCB et al., No. 83-166, 2nd Dist., June 4, 1984. Criteria #1 does not give local government a right to stall around waiting for the "best" or "most favored" applicant, any more than it provides for a right of the applicant to stay in business. We read the statute as providing that the first applicant satisfying all criteria is entitled to approval.

OPTION II

The Board, in upholding the County on Criterion #1 strongly relied upon the extended life of the existing site resulting from Industrial's jury-rigged two site disposal pattern. (Op. p. 6) We do not believe this was a proper reliance for a number of interrelated reasons:

1. Restriction of use of the 40 acre site to "non-regional" waste was not a voluntary decision by Industrial. It was instead a defensive decision, to protect Industrial's interests while coping with the SB 172 process and subsequent Agency permitting, a process which this Board knows can take as long or longer than the remaining life of its existing site. Industrial's actions were against its interests in getting SB 172 approval, and, so, in a certain sense, Industrial graphically demonstrated its belief that a facility was necessary.

2. The Board should continue to focus only on the single site for which regional pollution control status is sought, not on a tandem arrangement. The Board earlier asserted that it would not consider applicants' arguments for site necessity that bootstrapped need for an expanded site off need for an existing site, and it should similarly not consider the interdependent arrangement here.

3. Non-regional sites are not a class that is included in the SB 172 approval process. To evaluate the statutorily limited

service areas of non-regional sites when considering the "area intended to be served" by the various classes of regional sites perverts the SB 172 process and sets unfortunate precedent. Are existing compost piles to be considered? On-site facilities?

4. Since the Board has relied on waste separation by point of origin to extend to seven to nine years the life of a site that is "the only game in town", and supported the notion that the time left is too long to demonstrate "necessary", how and when can Industrial, or any other applicant for that matter, successfully demonstrate "necessary"? When has the "at this time" period ended? The Board does not explain why seven to nine years is too long, given the lack of options here and the years it takes to get refuse and special waste regional sites operating to serve the whole area. The SB 172 process alone can be lengthy. If the County decision is appealed up by the applicant or a third party, it can take years.

Ironically, given the apparent short-life situation at the Mt. Vernon and Salem landfills, even this less-than-precise record indicates that the outer areas also may be at least temporarily dependent on whether Industrial can successfully mix and match the incoming waste.

Obviously we do not feel that the record in this case is as deficient as do the majority of our collegues, and certainly as it relates to the Centralia area. The evidence is not all "he said, I said," as the majority indicated (see Op., p. 6-7). The discrepencies on the short remaining life of the Mt. Vernon and Salem landfills were not great. The inadequate size of the Salem landfill was not disputed.

Under the circumstances of this case, what "direct evidence"* does the Board want? In prior cases the Board has accepted direct "eyeball" estimated-life ranges by people in the business, and even hearsay estimates from on-site interviews with operators of other sites. Life-of-site estimates are by nature educated guesses, even when there is familiarity with daily activities.

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*We believe the Board should have given greater weight to the testimony at the second hearing, as this testimony was subject to cross-examination, which was not allowed at the first hearing. Notwithstanding we believe the Board misperceived the factual context in which some statements were made. For example, the Board gave broad meaning to an opponent's statement that she felt that the Mt. Vernon landfill was a viable alternative to the Industrial facility. (Op. p. 6) In fact, she was only referring to the special waste of one company, General Tire, being driven in from Mr. Vernon. (A-R. 106)

Regarding the anticipated Tri-County site, the opponents and the County Board members would have certainly been highly motivated to dispute Mr. Prior's assertion that the Tri-County site was not underway by providing contrary documentation. While Mr. Prior might have been well advised to be more precise, does the Board expect him to subpoena the City Manager as a hostile witness, despite lack of statutory authority to do so? Noone, even the citizens getting data from the Agency, ever mentioned that a site location had been determined, let alone that permit or SB 172 applications were pending. In fact, the actively participating attorney for the citizens spoke of a preference for a site located between Centralia and Salem (C-R 101), leading us to believe that none has been chosen. The Board's acceptance of the hearsay assertion that the Tri-County site will be ready in time begs the question of whether it should even be considered, as discussed earlier, in an SB 172 setting.

While Criterion #1 serves to restrict the marketplace, it need not be construed so as to, in effect, preclude competition, set up exclusive territories, encourage preferential treatment, raise antitrust questions or create a disruptive and chaotic system of waste management. Any of these results now exist or will occur, depending on who "wins." This Board, by its action here, is countenancing a monopoly situation where only one facility will be permitted to operate in any given area. If the Legislature intended to restrict competition to this degree, it would have passed legislation which would have established landfills as public utilities and regulated them as such, recognizing their monopoly status.

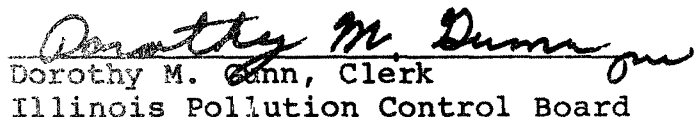
Finally, regardless of whether this Board has overturned or sustained the decision of the local governing bodies in SB 172 cases, it has not, we believe, so narrowly applied the manifest weight standard or taken such a stringent view of acceptable evidentiary standards. In so doing, we believe it has placed a new gloss on such words as "reasonably required" and "clearly evident, plain and indisputable weight of the evidence". We believe the Board has set in motion an unfortunate and unnecessary skewing of the waste management program in this state and, in Marion County, has created a monumental stand-off.

For these reasons we dissent.

Joan G. Anderson

J. Theodore Meyer

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was filed on the 21st day of August, 1984.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board