ILLINOIS POLLUTION CONTROL BOARD
December 6, 1989

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

SUPPLEMENTAL OPINION (by M. Nardulli):

On December 6, 1989, the Board adopted 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"). 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 1 issue in this case.

The "draft Opinion" referred to above contained the following language in its discussion of criterion No. 1:

> The Board notes that it is disturbed by Objectors' argument that the City properly found that need was not established because, absent the inclusion of Cook and Lake Counties in the intended service area, the instant facility is not "needed." Section 39.2(a)(1) of the Act provides that the applicant has the burden of establishing that "the facility is necessary to accommodate the waste needs of the <u>area intended to be served</u>." (Ill. Rev. Stat. 1987, ch. 111½, par. 1039.2(a)(1) (emphasis added).) It is the applicant who

> defines the intended service area, not the local decision making body.[1] Absent the adoption of solid waste management plan pursuant to section 39.2(a)(8) of the Act (the effect of which will not be speculated upon at this time), a local decision making body is not free to redefine the intended service area. The Board also notes that the City's statement that "the possibility of more convenient sites being developed" is speculation. (See, Tate v. PCB, No. 4-89-0061, slip. op. at 51 (4th Dist. Sept. 28, 1989).)

The above-quoted paragraph is the language which is referred to in the Supplemental Opinion filed January 4, 1990. (Metropolitan Waste Systems, Inc. v. PCB, PCB 89-121. (Supp. Opinion by Dumelle, Forcade and Flemal).) That Supplemental Opinion states that the members agree with the majority of the "draft Opinion's" discussion on criterion No. 1. (Id. at 1.) "However, there was one paragraph with which we disagreed." (Id.) The Supplemental Opinion concludes with the statement that "[f]or these additional reasons, we voted to uphold the City's decision." (Id. at 6.)

The unusual procedural circumstances surrounding the Board's decision in this matter warrants attention. Moreover, such an explanation is particularly necessary in light of the Appellate Court's mandate that, to avoid remandment, the Board must review the local governmental body's decision on each contested criteria. (Waste management v. PCB, 175 Ill. App. 3d 1023, 530 N.E.2d 682, 691-92 (2d Dist. 1988).)

At the December 6, 1989 meeting at which decision in this matter was statutorily required to be made (Ill. Rev. Stat. 1987, ch. 111½, par. 1040(a)(2)), this Board voted on each contested criterion separately. As noted in the majority Opinion, only six Board Members were present at the meeting and the Board "deadlocked" at a 3-3 vote on criterion No. 1. (Waste Management Systems v. PCB, PCB 89-121 (December 6, 1989).) I fail to understand how such a "deadlock" occurred in this cause in light of the language of the Supplemental Opinion filed by those three

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[1]The Board notes that an Applicant who proposes a large or highly populated service area still carries the burden of establishing need based upon a consideration of such relevant factors as the existence of other disposal sites, expansion of current facilities and projected changes in refuse generation. Hence, a larger intended service area will arguably impose a greater burden upon the Applicant in terms of the amount and type of evidence needed to be presented.

members who voted against (i.e., dissented from) the "draft Opinion's" conclusion on criterion No. 1. The "draft Opinion" stated that, for various reasons, the City's determination that Applicants failed to establish that the proposed facility is necessary to accommodate the waste needs of the intended service area is not against the manifest weight of the evidence. The Supplemental Opinion reproduces and reiterates its support for this language, with the exception of one paragraph. (Supp. Op. by Dumelle, Forcade and Flemal at 2-5 (January 4, 1990).) Apparently, the members joining in the Supplemental Opinion are in full agreement with the ultimate outcome on criterion No. 1 -- that ultimate outcome being that the City's determination that Applicants failed to meet criterion No. 1 should be affirmed. Those Members, however, strongly disagreed with the language of one paragraph of the "draft Opinion's". (Supp. Op. by Dumelle, Forcade and Flemal at 1 (January 4, 1990).)

I believe that the appropriate course of action to be taken when one disagrees with an aspect of an adjudicatory body's reasoning, but agrees with the ultimate outcome, is to file a concurring opinion. Such an opinion gives those who are in disagreement with the majority's reasoning the opportunity to explain that disagreement while at the same time noting agreement with the ultimate outcome. It is only when one disagrees with the majority's ultimate outcome (in this case, the determination that the City's decision on criterion No. 1 is not against the manifest weight of the evidence) that one should dissent. While I appreciate the sensitive nature of the disputed paragraph contained in the reasoning of the "draft Opinion," I do not believe that the practice of dissenting in form and agreeing in substance can ever be countenanced. The instant matter, where it is of the utmost importance for the Board to render a decision on each contested criterion, highlights the unfavorable consequences of adhering to such an improper procedural practice. Perhaps the proper application of concurring and dissenting opinions could be addressed in the promulgation of the Board's procedural rules.

Although the unfortunate procedural circumstances surrounding the Board's decision on criterion No. 1 prevented the filing of a majority Opinion on that criterion, for purposes of appellate review it is important to state that I am in full agreement with that portion of the "draft Opinion's" discussion on criterion No. 1 reproduced in the Supplemental Opinion filed January 4, 1990 beginning at the second paragraph on page two. (Supp. Opinion by Dumelle, Forcade and Flemal (January 4, 1990).) I believe that the City's determination that Applicants failed to establish that the proposed facility is necessary to accommodate the waste needs of the area it is intended to serve is not against the manifest weight of the evidence. (Ill. Rev. Stat. 1987, ch. 111½, par. 1039.2(a)(1); Waste Management of Illinois, Inc. v. PCB, 122 Ill. App. 3d 639, 461 N.E.2d 542 (3d Dist. 1984).)

As noted above, however, I would also have included a statement in response to an argument raised by Objectors in their brief. In an attempt to bolster the City's determination that the "need criterion" was not been met by Applicants, Objectors argued that the City properly found that need was not established because, absent the inclusion of Cook and Lake Counties in the intended service area, the instant facility would not be "necessary." I would have included, in the majority Opinion, a statement that it is the Applicant who defines the intended service area, not the local decision making body and that, in the absence of a solid waste management plan, a local decision making body is not free to redefine the intended service area. Such a statement is consistent with the plain language of criterion No. 1. (Ill. Rev. Stat. 1987, ch. 111½, par. 1039.2((a)(1).) Section 39.2(a)(1) of the Act provides that the applicant must demonstrate that "the facility is necessary to accommodate the waste needs of the area it is intended to serve." According to this criterion, any assessment of need must be done in the context of the intended service area as proposed by the applicant. A contrary interpretation allowing a local decision making body to reject or redefine a service area would, in essence, divide criterion No. 1 into two separate inquires: (1) do we like the service area?; and (2) if so, is there a need? Had the legislature intended to allow a local decision making body to reject an applicants' request for siting location suitability solely on the desirability of the intended service area, the legislature would have included such a separate criterion. Rather than providing for two separate inquiries, the legislature, in criterion No. 1, provided for a determination of need based upon the area intended to be served by the applicant.

Lastly, I would note my disagreement with the statement in the Supplemental Opinion filed January 4, 1990, that the paragraph contained in the "draft Opinion" discussing the local decision making body's inability to redefine the intended service area would have reversed this Board's decision in Fairview Area Citizens Task Force v. Village of Fairview, PCB 89-33 (June 22, 1989).) We stated in Fairview that a local decision making body "has the power to determine if a proposed service area is acceptable or unacceptable." (Id. at 13-14.) This statement must be viewed in light of the plain language of section 39.2(a)(1) of the Act. Section 39.2(a)(1) states that siting approval shall be granted only if the proposed facility "is necessary to accommodate the waste needs of the area it is intended to serve." If, as in Fairview, a local decision making body finds that need has been established for the service area intended by the applicant, I agree that it can be said that the local decision making body has, by implication, accepted that service area. However, I do not believe that the converse of this is necessarily true. I do not believe that section 39.2(a)(1) grants to the local unit of government any "power" or "authority" to reject the proposed service area alone without any reference to "need". I believe that a local decision making body is free to "determine if a proposed service area is

acceptable or unacceptable" as it relates, and only as it relates, to whether that applicant has established that the facility is necessary to accommodate the waste needs of the area it is intended to serve. In light of this position, I do not believe that the paragraph proposed in the "draft Opinion" is at odds with, or would have reversed, Fairview as the Supplemental Opinion suggests. Further, I believe that the construction of Fairview suggested by the Supplemental Opinion filed January 4, 1990 is an inaccurate representation of the Board's intent and, further, is in error as it fails to apply the plain meaning of section 39.2(a)(1) of the Act.

Michael L. Nardulli
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board hereby certify that the above Supplemental Opinion was entered on the 8th day of January 1990.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board