ILLINOIS POLLUTION CONTROL BOARD
August 2, 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;

JAMES CREASON, ESQ. (ASSISTANT STATE'S ATTORNEY) APPEARED ON BEHALF OF MARION COUNTY, RESPONDENT.

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

This matter originally came to the Board on a November 21, 1983 petition by Industrial Salvage, Inc. ("Industrial") seeking review of a decision by the County Board of Marion ("Marion") that denied site location suitability approval for Industrial's proposed regional pollution control facility. In a February 22, 1984 Opinion and Order, this Board found that the procedures employed by Marion were fundamentally unfair, for failing to provide opportunity for cross-examination, and remanded the matter to Marion for further proceedings. Marion held an additional hearing on April 5, 1984, and on May 8, 1984 again denied approval of site location suitability for Industrial's facility. On May 6, 1984, Industrial filed a Petition for Review after remand seeking to reverse that decision. The Board's hearing was held July 6, 1984.[1] Briefs were due July 18, 1984, but none were filed.

[1] As a result of the multiple hearings in this matter, citations to the record can be confusing. For clarity, the Board will precede each citation with an "A", "B", "C" or "D" for hearings as follows:

"A" = Original Marion hearing 9/13/83
"B" = Original PCB hearing 2/2/84
"C" = Marion remand hearing 4/5/84
"D" = PCB remand hearing 7/6/84

Thus, a reference to page 36 of the transcript for the original Marion hearing would be (A-R., 36), Petitioner's Exhibit 9 from that hearing would (A-Pet. Ex. 9).

The object of this dispute is Industrial's proposal to develop a 40 acre addition adjacent to their existing landfill facility on Perrine Avenue in Centralia. Neither the existing facility nor the proposed addition would accept hazardous waste. The old city landfill, which was closed in 1972, is north and east of the proposed addition. Industrial's existing facility is to the west, and a large wooded area without residences or structures is to the south.

Industrial's original application was denied by Marion on October 11, 1983 with a finding that:

1. The proposed regional pollution control facility is not urgently necessary at this time to accommodate 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.

As more fully explained in the February 22, 1984 Opinion, this Board found the procedures employed by Marion to be fundamentally unfair in light of the legislative due process standard established in E & E Hauling, Inc. v. Pollution Control Board, et. al., 71 Ill. Dec. 587, 451, N.E. 2d 555 (1983), and remanded the matter to Marion. Marion held an additional hearing on April 5, 1984, at which cross-examination and questioning by the public was allowed. The entire record of the original Marion proceeding was accepted into evidence (C-R. 4). Most of the original witnesses read their testimony from the original hearing and then stood for cross-examination. However, the original testimony was not retyped in the second transcript. Therefore, it is necessary to refer to the transcript of the first Marion hearing to find the complete testimony given by each witness at the second hearing. Some additional testimony was entered. On May 8, 1984, Marion denied site location suitability approval for the facility with the following findings:

1. The proposed regional pollution control facility is not necessary at this time to accommodate 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.

Industrial seeks review of that decision here.

There is one significant fact which has changed since the original matter was presented to this Board. Industrial submitted a proposal and application to develop a non-regional pollution control facility, on the subject 40 acre plot, to Illinois Environmental Protection Agency ("Agency") (C-Ex. 1a). On February 9, 1984, the Agency granted Industrial a developmental permit for the non-regional facility (C-Ex. 2a). If Industrial does not ultimately receive approval for the facility as a regional facility, they intend to accept regional waste only at the existing facility and non-regional waste only at the new facility when and if an operating permit is issued by the Agency (C-R. 19, 56).

The Board has reviewed the procedures used by Marion on remand and finds those procedures fundamentally fair. Cross-examination and questions from the audience were provided for and did occur. Since each witness at the second Marion hearing read his or her testimony from the first hearing into the record and then stood for cross-examination on that testimony, the procedural defects in the original testimony have been cured.

The substantive provisions for County Board consideration in regional pollution control facility siting approval matters are found in Section 39, 2(a) of the Environmental Protection Act ("Act"). Only the first two provisions are relevant to this proceeding, and they state:

> 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 accommodate 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;

For each of the criteria in Section 39.2(a) of the Act, the petitioner bears the burden of proving to the County Board that the proposed facility satisfies the criteria Waste Management of Illinois, Inc., v. Illinois Pollution Control Board, Doc. No. 3-83-0325, 3-83-0339, Cons., Third District, Filed _____, (hereinafter "Waste Management I"); Waste Management of Illinois ,Inc. v. Illinois Pollution Control Board, Doc. No. 83-166, Second District, May 8, 1984, (hereinafter "Waste Management II"). Since

this is a civil matter, the burden of proof is a preponderance of the evidence. Arrington v. Walter E. Heller International Corp., 30 Ill. App. 3d 631, 333 N.E. 2d 50 (1975); Ritenour v. Police Board of the City of Chicago, 53 Ill. App. 3d 877, 369 N.E. 2d 135 (1977); Drezner v. Civil Service Commission, 398 Ill. 219, 75 N.E. 2d 303 (1947). A proposition is proved by a preponderance of the evidence when it is more probably true than not. Estate of Ragen, 79 Ill. App. 3d 8 (1979).

On reviewing that decision, this Board must affirm the County Board unless their decision is contrary to the manifest weight of the evidence. Waste Management I, Waste Management II, E & E Hauling, Inc. v. Illinois Pollution Control Board, 116 Ill. App. 3d 586 (1983). Manifest weight of the evidence is that which is the clearly evident, plain and indisputable weight of the evidence, and in order for a finding to be contrary to the manifest weight of evidence, the opposite conclusion must be clearly apparent, Drogos v. Village of Bensenville, 100 Ill. App. 3d 48 (1981); City of Palos Heights v. Packel, 121 Ill. App. 2d 63 (1970).

Marion has denied site location suitability approval and that denial is based on findings that Industrial did not satisfy Criterion No. 1 (need) and Criterion No. 2 (Public health, safety, and welfare). Since Marion did not make specific findings on the other four criteria, this Board must presume that Industrial carried the burden of proving its facility satisfied those criteria. Since Industrial must prove its facility satisfied each criteria, the Marion decision to deny will not be set aside unless both findings are contrary to the manifest weight of the evidence.

CRITERION NO. 1 - NEED

Under Section 39.2(a)(1), Marion was to approve the site only if Industrial carried its burden of proving, "the facility is necessary to accommodate the waste needs of the area it is intended to serve." In E & E Hauling, supra, the Second District evaluated the word "necessary"; it found that absolute necessity was too stringent a standard, and employed terms "expedient" and "reasonably convenient" to describe the required level of proof. Shortly thereafter, the Third District was required to evaluate "necessary" in Waste Management I. In refusing to follow the Second District's lead, the Third District stated:

> However, we disgree with its statement that "necessary" means only "expedient" or reasonably convenient." The legislature used the term "necessary" and some of its core meaning, connoting a degree of requirement or essentiality, must be assigned to that use of the word. While we do not construe the language to mean that landfills must be shown to be absolutely necessary, nevertheless, we find that they must be shown to be reasonably required by the waste needs

> of the area intended to be served, taking into consideration the waste production of the area and the waste disposal capabilities, along with any other relevant factors.

In Waste Management II, the Second District was required to re-evaluate its prior definition of "necessary" in E & E Hauling. It modified E & E Hauling to hold that an element of urgency is required in proof of need (Slip Opinion, p. 13) and found Waste Management I persuasive (Slip Opinion, p. 17).

Thus, for Industrial to prevail before this Board, the clearly evident, plain and indisputable weight of the evidence must show that the proposed facility is reasonably required by the waste needs of the area intended to be served taking into consideration the waste production of the area and the waste disposal capabilities, along with other relevant factors. With this standard the evidence must be weighed.

Industrial provided evidence on three points to establish need: (1) limited remaining use full life of the existing facility, (2) waste production and disposal capacity in the area, and (3) increased transportation costs if facility approval was denied.

The remaining useful life of Industrial's existing facility is the least confusing aspect of the record below. Industrial accepts waste predominantly from a four county area. Of the waste it accepts 85% is from the Centralia area, 15% from outside that area (A-R. 58). If all of that waste continues to go to the existing facility its expected life is one to four years (A-R. 12, 36; B-R. 36). If the proposed facility operates as a non-regional facility with only regional wastes going to the existing facility the expected useful life of each one is seven to nine years (B-Pet. Ex. No. 1A, p. 1). Only Industrial provided evidence on remaining useful life.

There is very little evidence in this record on waste generation and disposal capacity. It is clear that Industrial's existing facility receives most of its waste from the Centralia area with smaller amounts from the remainder of the four county area and insignificant amounts from beyond the four county area (A-R. 15, 16, 85; B-R, 14, 54). However, there was no testimony regarding the total waste generation of the area or the disposition of waste that does not go to Industrial. The Board presumes that if Industrial accepts from 20% to 90% of the wastes from eight municipal areas (A-R. 16), that the remaining volume must go to other facilities.

Evidence on area waste disposal capacity was brief. Industrial provided two witnesses. One witness testified that he did not know if the Salem landfill could handle the additional volume when Industrial is full, and was told that Mt. Vernon would not be operating much longer and doubted it could handle the additional load, although he had not done a study on it (A-R. 16). The other Industrial witness testified that Mt. Vernon had

a remaining life of three to four months and Salem had about two years, both opinions based on what he had read in the newspapers and from driving by (B-R. 60, 64, 65).

One opponent to the facility testified that the Mt. Vernon landfill was a viable alternative to the proposed facility (A-R. 106). Another opponent testified that the proposed tri-county landfill would be available in ample time for the additional volume; this testimony was based on a radio interview with Centralia's city manager which the witness heard the day of the hearing (A-R. 91).

On the last point, Industrial provided testimony that if capacity was not available at their location businesses would bear a substantial economic burden through increased transportation costs (A-R. 64). However, some of Industrial's users that are closer to the Salem landfill use Industrial because of easier access (A-R. 52). Additionally, Industrial provided letters from local industries that, to the extent they address the issue, say a convenient "local landfill" is a plus to industry since "proper waste hauling and disposal is a major expense" (A-Pet. Ex. 13).

In addition to the above testimony and exhibits, the attorneys at the Marion hearings recited several "facts" not found in the testimony or exhibits. Since this was not sworn testimony subject to cross-examination, this Board has not considered these "facts."

In summary, the record shows that two witnesses testified that the new facility was necessary, two witnesses testified the facility was not necessary. All of this testimony was qualified by statements, such as "we're told,""we haven't done a study,""I read in the newspaper," and I heard on the radio," which tend to diminish the weight to be given the conclusions offered in the testimony. The contention that the existing site will last seven to nine years if operated with regional and non-regional components is well supported in the testimony of the proponent. Industrial has received a developmental permit for the non-regional facility (C-Ex. 1a). This fact strongly supports Marion's view that the regional facility is not necessary. There is no direct evidence that the proposed tri-county landfill has any permit or is even in an advanced state of pre-permit planning; nor is there direct evidence on the existing capacity and life expectancy of the Salem and Mt. Vernon landfills. However, the contention that tri-county will be ready in time and solve the problem and the contention that Mt. Vernon and Salem are nearly full were not rebutted and the Board must consider them.

The Board considered the testimony on increased transportation costs of little value. Faced with a similar situation, the Second District in Waste Management II stated, (at Slip Opinion 18-19):

> The only other evidence of need cited by petitioner is contained in the Lake County Board staff report which stated that "with greater disposal distances, cost to local municipalities and unincorporated areas will increase significantly." While this statement if supported by evidence would be relevant to prove need, petitioner has not cited nor can we find any specific evidence demonstrating that the area intended to be served will experience increased costs if the proposed landfill application is denied. We note that similar generalized statements concerning increased costs were recently held insufficient to establish the need for an expansion of an existing landfill facility. (Waste Management of Illinois, Inc. v. Pollution Control Board (Doc. Nos. 3-83-0325, 3-83-0339, Cons., Third District filed _____).) Before the LCB, petitioner bore the burden of establishing need. Although advancing the argument that denial of the application will increase service costs, petitioner has failed to present evidence supporting its statement. Absent such evidence, we conclude the petitioner has failed to sustain its burden and thus, the PCB's conclusion that petitioner has failed to establish need is not against the manifest weight of the evidence.

The record here shows only generalized statements concerning increased costs.

The Board finds that the record below does not show by the clearly evident, plain and indisputable weight of the evidence that Industrial's proposed facility is reasonably required by the waste needs of the area intended to be served, taking into consideration the waste production of the area and the waste disposal capabilities, along with other factors. On finding number one Marion is affirmed.

CRITERION NO. 2 (PUBLIC HEALTH, SAFETY, WELFARE)

In evaluating Criterion No. 2, Marion found:

> 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.

The evidence is undisputed that Industrial has never been found in violation of environmental regulations by a competent tribunal; neither has it been charged, taken to court, or threatened with suit for violation of such regulations (A-R. 45; B-R. 37). While much of the testimony below, of alleged violations, might have been proper in an enforcement action,

Industrial has never had its "day in court" to defend against those claims.

In a similar situation, the United States District Court for the Northern District of Illinois addressed a conflict where the Illinois Environmental Protection Agency had denied an operating permit for a landfill based on claims of violation of environmental regulations by its owner. Martel v. Mauzy, 511 F. Supp. 729 (1983). In enjoining such action, the Court stated (Id, at 742):

> The Agency also unquestionably has a legitimate interest in preventing persons with a prior history of violations from operating disposal sites. The means by which this may be accomplished are clearly set out in the Act. Sections 5(b), 30, 31, 32, and 33 confer broad investigatory and enforcement powers on the Board and the Agency, and Section 33(b) empowers the Board to punish violations of the Act by revoking permits. This existing scheme allows simple, fast, and efficient measures to be taken to preclude and punish violative conduct. Once such action has been taken, there is a clearly established and adjudicated basis for the denial of future permits as well. See Dixon v. Love, supra, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977). However, this prophylactic interest is poorly served by the procedures employed by the Agency in this case, since those procedures permitted the Agency to deny a permit to a person who has never been found by an administrative or judicial body to have violated any legal standards regarding waste facilities.

Here Marion found against Industrial on Criterion No. 2 for the same reasons and that finding must be reversed. Should the Agency, Marion, or any citizen seek to enforce compliance by any entity with any regulation, this Board is the competent tribunal for determining violations and ensuring future compliance.

Since the Board affirmed Marion's finding on Criterion No. 1, the decision of Marion denying site location suitability approval is affirmed.

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

ORDER

The decision of the Marion County Board denying Industrial Salvage's request for Regional Pollution Control Facility site location suitability approval is hereby affirmed.

IT IS SO ORDERED.

Board Members J. Anderson and J. Theodore Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 2nd day of August, 1984 by a vote of 4-2.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board