ILLINOIS POLLUTION CONTROL BOARD
November 29, 1990

RICHARD WORTHEN, CLARENCE BOHM, HARRY PARKER, GEORGE ARNOLD, CITY OF EDWARDSVILLE, CITY OF TROY, VILLAGE OF MARYVILLE, and VILLAGE OF GLEN CARBON,	)	
Petitioners,	)	PCB 90-137
	)	(Landfill Siting
v.	)	Review)
VILLAGE OF ROXANA and LAIDLAW WASTE SYSTEMS (MADISON), INC.,	)	
Respondents.	)	

GEORGE J. MORAN, SR., CALLAHAN & MORAN, P.C., APPEARED ON BEHALF OF PETITIONERS;

LEO H. KONZEN AND BRIAN KONZEN, LUEDERS, ROBERTSON, & KONZEN, APPEARED ON BEHALF OF RESPONDENT LAIDLAW WASTE SYSTEMS (MADISON), INC.

OPINION AND ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on a July 23, 1990 petition for hearing to contest the June 18, 1990, decision of respondent the Village of Roxana (Roxana). Petitioners Richard Worthen, Clarence Bohm, Harry Parker, George Arnold, the City of Edwardsville, the City of Troy, the Village of Maryville, and the Village of Glen Carbon (collectively, petitioners) ask that this Board review Roxana's decision granting site approval to respondent Laidlaw Waste Systems (Madison), Inc. (Laidlaw) for expansion of its Cahokia Road landfill. The petition for review is brought pursuant to Section 40.1 of the Environmental Protection Act (Act). (Ill.Rev.Stat. 1989, ch. 111 1/2, par. 1040.1.) This Board held a public hearing on the petition for review on October 2, 1990.

PROCEDURAL HISTORY

On January 2, 1990, pursuant to Section 39.2 of the Act, Laidlaw filed an application with Roxana for siting approval of a vertical and horizontal expansion of its existing Cahokia Road landfill. This proposed facility had previously been the subject of a siting proceeding before the Madison County Board in late 1987 and early 1988. On February 8, 1988, the Madison County Board denied siting approval. A second application for siting approval was filed with the Madison County Board in June 1988, but was

withdrawn by the applicant before a decision was made. (Application for Regional Pollution Control Facility Site Approval for the Cahokia Road Sanitary Landfill, Village of Roxanna, Illinois (hereafter "App."), Vol. I, p. 27.) The site of the facility was subsequently annexed to Roxana, pursuant to an agreement between Laidlaw and Roxana.

Public hearings on the instant application were held by the Roxana Regional Pollution Control Hearing Committee on April 3, 4, 5, 6, 10, and 11, 1990. A hearing officer, Thomas Immel, conducted the hearings. On June 18, 1990, the Roxana Board of Trustees adopted the hearing committee's findings of fact and approved Laidlaw's request for siting approval for expansion of the facility.

MOTION TO DISMISS PARTIES

On August 10, 1990, Laidlaw filed a motion seeking to dismiss four of the eight named petitioners as parties to this appeal. Specifically, Laidlaw seeks to dismiss Richard Worthen, City of Troy, Village of Maryville, and Village of Glen Carbon on the grounds that those four petitioners are not located so as to be affected by the proposed facility. These four petitioners filed their answer to the motion to dismiss on August 22, 1990. On August 30, 1990, this Board issued an order stating that it would take the motion with the case. The Board believed that there was insufficient information before it at that time to determine whether the four petitioners are located so as to be affected by the proposed facility, and thus directed the parties to address the motion at hearing and in their briefs. The motion must now be decided.

Section 40.1(b) of the Act, which governs this appeal, provides that this Board shall hear the appeal of any third party who participated in the local hearings and is so located as to be affected by the proposed facility. Laidlaw asks that the Board dismiss the petitioners because they are not located so as to be affected by the proposed facility.[1] In support of this claim, Laidlaw states that: 1) the City of Troy is located 7.5 miles from the proposed facility, and its municipal water supplies are over 9 miles from the proposed facility; 2) the Village of Maryville is located 6.2 miles from the proposed facility, and its municipal water supplies are 5.2 miles from the proposed facility; 3) the City of Glen Carbon is 3 miles from the proposed facility, and its municipal water supplies are 5.7 miles from the proposed facility,

[1] Laidlaw does not contend that the petitioners did not participate at the local level, as required by Section 40.1 of the Act. As the Board noted in its August 9, 1990 Order in this case, it appears that the petitioners did indeed participate in the hearing below.

and the City of Edwardsville is located between the proposed facility and Glen Carbon; and 4) Richard Worthen lives in the City of Alton, which is located 6.5 miles to the northwest of the proposed facility. Therefore, Laidlaw asserts that these petitioners are not located so as to be affected by the proposed facility, and must be dismissed.

In response, the four petitioners contend that Laidlaw has waived its right to argue that the four petitioners are not proper parties to this appeal when Laidlaw failed to raise this claim at the local hearings before the Roxana Regional Pollution Control Hearing Committee. Petitioners also maintain that they are indeed located so as to be affected by the proposed facility.

The Board first notes that although it specifically asked the parties to address this issue at the Board hearing, the parties did not do so. Thus, there is no more evidence on the factual issues of this motion before the Board than there was at the time the motion was filed. The Board must rule on the motion, however. Initially, the Board finds that Laidlaw did not waive its claims by failing to raise the issue at the local level. The requirement that a person who appeals a local decision be located so as to be affected is found only in Section 40.1 of the Act. All activity at the local level is governed by Section 39.2 of the Act, and that section does not limit participation to those who are located so as to be affected by the proposed facility. Therefore, there was no basis for Laidlaw to object to the four petitioners' participation at the local level. In other words, there was no issue as to a person's standing at the local level, and Laidlaw properly raised the issue for the first time before the Board. The Board reached this same result in Valessares v. The County Board of Kane County, 79 PCB 106, 115-117 (PCB 87-36, July 16, 1987).

Laidlaw's arguments on the substance of its motion to dismiss are based on the distance that the four challenged petitioners are located from the facility. Laidlaw contends, and the petitioners have not disputed, that those challenged petitioners are located between 3 and 9 miles from the proposed facility. Laidlaw thus concludes that the petitioners are not located so as to be affected. The Board rejects that claim, and denies Laidlaw's motion to dismiss the four challenged petitioners. On the one hand, Laidlaw contends that the petitioners are not located so as to be affected, while on the other hand it is undisputed that the four challenged petitioners live within the service area as defined by Laidlaw.[2] The Board does not see how petitioners who live

[2] The Board notes that there is some dispute as to whether the intended service area of the proposed facility is the three-county area of Madison, St. Clair, and Monroe Counties, or whether the intended service area is a 100-mile radius of the facility. This dispute has no bearing on the Board's ruling on the motion to

within the service area are not "so located as to be affected by the proposed facility." Again, the Board reached the same result, under very similar facts, in Valessares. 79 PCB 106, 117-119. The Board also notes that Laidlaw's implication that the challenged petitioners' water supplies are not affected by the facility is not persuasive, since the effect of a proposed facility on water supplies is not the only issue to be considered in a local siting proceeding. Laidlaw's motion to dismiss the four challenged petitioners is denied.

STATUTORY FRAMEWORK

At the local level, the siting approval process is governed by Section 39.2 of the Act. Section 39.2(a) provides that local authorities are to consider as many as nine criteria when reviewing an application for siting approval. Only if the local body finds that all applicable criteria have been met can siting approval be granted. The Roxana Village Board of Trustees found that Laidlaw's application met all of the applicable criteria, and thus granted siting approval for the proposed expansion. (Ordinance No. 582, adopted June 18, 1990.) When reviewing a local decision on the criteria, this Board must determine whether the local decision was against the manifest weight of the evidence. E & E Hauling, Inc. v. Illinois Pollution Control Board, 116 Ill.App.3d 586, 451 N.E.2d 555 (2d Dist. 1983), aff'd in part 107 Ill.2d 33, 481 N.E.2d 664 (1985); Waste Management of Illinois, Inc. v. Illinois Pollution Control Board, 122 Ill.App.3d 639, 461 N.E.2d 542 (3d Dist. 1984). In this case, petitioners have not challenged Roxana's findings on the substantive criteria of Section 39.2, so there are no issues on the criteria before the Board.

Additionally, the Board must also review the areas of jurisdiction and fundamental fairness. Section 40.1 of the Act requires the Board to review the procedures used at the local level to determine whether those procedures were fundamentally fair. The parties in this proceeding have framed all of the issues as fundamental fairness issues. However, the Board believes that one of the issues is a jurisdictional issue, and will address that issue first.

JURISDICTION

In their petition for hearing, petitioners contend that Laidlaw is barred from receiving site approval because the instant application for site approval violated the "two-year" restriction of Section 39.2(m). That subsection states:

> An applicant may not file a request for local siting approval which is substantially the same

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dismiss, because the petitioners are all located in Madison County.

> as a request which was disapproved pursuant to a finding against the applicant under any of criteria 1 through 9 of subsection (a) of this Section within the preceding two years.
>
> (Ill.Rev.Stat. 1989, ch. 111 1/2, par. 1039.2(m).)

This contention--that Laidlaw filed its application before the Roxana Board in violation of this subsection--was part of a motion to dismiss raised at the local level. That motion to dismiss was denied by the hearing officer. (Tr. 4-3-90, pp. 40-44.)[3] Both parties subsequently argued this issue before the Board as questions of fundamental fairness: whether fundamental fairness was denied when the hearing officer made a finding on the issue, rather than the Roxana hearing committee, and whether fundamental error occurred when the Roxana hearing committee failed to make a finding on the issue. However, this Board believes that the issue is properly framed as a jurisdictional issue. If the application was filed in violation of subsection (m), then the Roxana Board of Trustees had no jurisdiction to consider the application.

The facts on this issue are undisputed. On August 19, 1987, GSX Corporation of Illinois filed an application for approval of expansion of the "Barton Landfill".[4] GSX Corporation of Illinois is now known as Laidlaw Waste Systems (Madison), Inc. (Tr. 4-3-90, p. 80; App. Vol. I, pp. 24, 27.) That application was denied by the Madison County Board on February 8, 1988. (App. Vol. I, p. 27; Vol. II, Appendix C, pp. C3-C9.) The landfill was subsequently annexed to Roxana, pursuant to an agreement between Laidlaw and Roxana. On January 2, 1990, Laidlaw filed the instant application with Roxana for siting approval of a vertical and horizontal expansion of the landfill. The petitioners argue that this 1990 application was filed too early, in violation of the two year restriction of subsection (m). Petitioners contend that the two year period begins to run on the date that the first application is disapproved--in this case, February 8, 1988. On the other hand, Laidlaw maintains that the two year period begins on the date the first application is filed--here, August 17, 1987. If petitioners' interpretation of the statute is correct, this application was filed 36 days too soon, and violates subsection (m). If Laidlaw's interpretation is correct, this application was filed several months after the expiration of the two year period.

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[3] "Tr." and the applicable date will be used to refer to the transcripts of the local hearings.

[4] The name "Barton Landfill" apparently arose from the fact that the landfill was originally operated by Donald Barton. This is the same facility which is now known as the Cahokia Road Sanitary Landfill. (App. Vol. I, p. 27.)

Neither the Board nor the courts have addressed the issue presented here: whether the two year period between applications for siting approval begins to run on the date of filing of the first application or on the date of disapproval of the first application. Subsection (m) was added to Section 39.2 by P.A. 85-945, effective July 1, 1988. When construing a statute, one looks first at the plain language of that statute. (Kirwan v. Welch, 133 Ill.2d 163, 549 N.E.2d 348, 139 Ill.Dec. 836 (1989); American Country Insurance Co. v. Wilcoxon, 127 Ill.2d 230, 537 N.E.2d 284, 130 Ill.Dec. 217 (1989).) The language of subsection (m), as it relates to the time period, states:

> An applicant may not file a request for local siting approval which is substantially the same as a request which was disapproved...within the preceding two years. (emphasis added.)

The Board believes that this language hinges on the disapproval of the first application. The statute states that an applicant cannot file a second application which is substantially the same as a request which was disapproved within the preceding two years. The phrase "within the preceding two years" must be given its plain meaning. That phrase refers back to the disapproval of the first application, not to the filing of the first application. In other words, if a substantially similar application has been disapproved at any time within the two years prior to the filing of the second application, that second application is barred by subsection (m). The Board finds that the two year prohibition on filing a substantially similar application for siting approval begins to run on the date of disapproval of the first application, not on the date of filing of the first application. Therefore, because Laidlaw filed the instant application for siting approval within two years of the disapproval of the first application, the second application violated subsection (m).

The Board notes that there are two other factors to be considered in applying subsection (m) to this case. First, the statute prohibits the filing of a request which is "substantially the same" as an earlier request. Although Laidlaw did contend, in response to petitioners' motion to dismiss at the local level, that the two applications are not substantially similar, Laidlaw has not raised this claim before this Board. The Board has reviewed the record, and believes that the two applications are indeed "substantially similar." Both applications seek expansion of the same facility. Second, the two applications in this case were brought before two different local decisionmaking bodies--the first before the Madison County Board and the second before the Roxana Board of Trustees. Laidlaw does not contend that subsection (m) is limited to two substantially similar applications before the same decisionmaking body, and the Board does not believe that the subsection is so limited. The language of the statute speaks only

of substantially similar requests for siting approval, filed within two years of the disapproval (on the merits) of the first request. There is no requirement that both applications be before the same decisionmaker.

Because Laidlaw's application was filed within the two year prohibition of subsection (m), the Board finds that the Roxana Board of Trustees had no jurisdiction to consider the request. Because the jurisdictional issue is dispositive of this proceeding, the Board will not consider the other issues raised by petitioners.

ORDER

The Board finds that Laidlaw's application for siting approval was filed less than two years after the disapproval of the first, substantially similar request for siting approval, in violation of Section 39.2(m) of the Act. Therefore, the Roxana Board of Trustees had no jurisdiction to consider the application. Roxana's decision granting site approval is reversed.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 29th day of November, 1990, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board