ILLINOIS POLLUTION CONTROL BOARD October 6, 1988

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RICK MOORE, LEONARD MORRIS, AND EDITH SIMPSON, Petitioners, vs. WAYNE COUNTY BOARD AND DAUBS LANDFILL, INC.,

PCB 86-197

Respondents.

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

This matter is before the Board on a motion to vacate filed by petitioners Rick Moore and Leonard Morris on July 7, 1988.* Respondent Daubs Landfill, Inc. (Daubs) filed objections to the motion on July 20, 1988. On August 4, 1988, the Board ordered petitioners and Daubs to submit briefs on issues raised by the motion to vacate. Petitioners filed their brief on August 24, 1988, and Daubs submitted its brief on September 14, 1988. On October 3, 1988, petitioners filed a reply brief with a motion to file that reply instanter. The motion to file instanter is granted.

Petitioners' motion asks the Board to vacate its June 2, 1988 Opinion and Order, which upheld the decision of respondent Wayne County Board granting site approval to Daubs. Petitioners maintain that Daubs failed to perfect service of pre-filing notice on all property owners within 250 feet of the proposed facility. Specifically, petitioners contend that Daubs did not serve Wayne County Bank and Trust Company, which is listed in the county tax records as the owner of two parcels of land in the subject area. Petitioners thus insist that Daubs' failure to serve notice on Wayne County Bank and Trust constitutes a jurisdictional defect in the proceedings, pursuant to Section 39.2(b) of the Environmental Protection Act (III. Rev. Stat. 1987, ch. 111 1/2 par. 1039.2(b)), divesting the Wayne County Board and this Board of jurisdiction.

As the Board noted in its June 2, 1988 Opinion and Order, this case has a long history before the Board. On February 19,

*Although Edith Simpson was a petitioner in earlier proceedings in this case, she is not listed as a petitioner in this motion. 1987, the Board vacated the Wayne County Board's siting approval, based on the Board's finding that a defective legal description of the site predominated over an accurate narrative description of the site. One year later, the Fifth District Appellate Court reversed that decision and remanded the case to the Board. <u>Daubs Landfill, Inc. v. Pollution Control Board</u>, 166 Ill. App. 3d 778, 117 Ill. Dec. 626, 520 N.E.2d 977 (5th Dist. 1988). Thus, the Board's June 2, 1988 Opinion and Order disposed of the other issues raised by petitioners in their original petition for review.

Petitioners' current contention that the Wayne County Board and this Board lacked jurisdiction of this case because of a defect in a statutorily required notice has not been raised before the instant motion to vacate. In its August 4, 1988 briefing order, the Board specifically asked petitioners and Daubs to address whether the Board has authority to review this jurisdictional issue consistent with the remand order of the appellate court. In response, petitioners and Daubs have raised a number of arguments. After careful consideration of these arguments, the Board finds that this jurisdictional claim cannot be raised at this late date.

Petitioner cites several cases for the proposition that the right to assert a jurisdictional issue exists at any time and in any proceeding, directly or collaterally. <u>Weingart v. Department of Labor</u>, 122 Ill. 2d 1, 118 Ill. Dec. 436, 521 N.E.2d 913 (1988); <u>R. W. Sawant Company v. Allied Programs Corp.</u>, 111 Ill. 2d 304, 95 Ill. Dec. 496, 489 N.E.2d 1360 (1986). However, the Board believes that these cases are not dispositive of the issue in this case. <u>Weingart</u> allowed a late-filed appeal where an administrative agency had entered a recoupment order beyond the time in which it was authorized to recoup benefits, while <u>Sawant</u> involved a default judgment against a company over whom the court had no personal jurisdiction. Neither of these situations are involved in this case.

Instead, the Board is persuaded by a line of cases which stand for the proposition that although subject matter jurisdiction may be contested at any time, jurisdiction of the subject matter does not mean simple jurisdiction of the particular case, but jurisdiction of the class of cases to which that individual case belongs. <u>People ex rel. Scott v. Janson</u>, 57 Ill. 2d 451, 312 N.E.2d 620, 624 (1974); <u>People v. Western Tire</u> <u>Auto Stores, Inc.</u>, 32 Ill. 2d 527, 207 N.E.2d 474 (1965); <u>People ex rel. Person v. Miller</u>, 56 Ill. App. 3d 450, 13 Ill. Dec. 920, 371 N.E.2d 1012, 1018 (1st Dist. 1977). Where the subject matter of the litigation is within the general jurisdiction of the tribunal, the claim of want of jurisdiction by reason of special circumstances cannot be raised for the first time on appeal. <u>People ex rel. Person</u>, 371 N.E.2d 1012, 1018. The Board specifically points out that both <u>People ex rel. Scott</u> and <u>People</u> <u>ex rel. Person</u> involve cases where the cause of action was created by statute and did not exist at common law. That is the case here: the local siting approval procedure exists solely as a statutory procedure. Although <u>People ex rel. Scott</u> and <u>People</u> <u>ex rel. Person</u> involve proceedings before a trial court, and not administrative proceedings, the Board believes that these cases provide guidance in the absence of case law involving administrative proceedings.

Therefore, the only jurisdictional claim which could be raised for the first time at this point in the proceeding is a claim that the Wayne County Board does not have jurisdiction over petitions for local siting approval. Pursuant to Section 39.2 of the Act, the Wayne County Board is the only body which can have jurisdiction over applications for approval of sites within Wayne County which are outside any municipal boundary. Petitioners do not contend otherwise. This Board cannot now consider a claim that certain notice was not given when that claim has never been advanced before. The proper time to raise such a claim is before the County Board or in a petition to this Board for review of siting approval, not in a motion to vacate filed nearly two years after the County Board's decision.

For these reasons, petitioners' motion to vacate is denied.

IT IS SO ORDERED.

Bill Forcade abstained; J. D. Dumelle dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the $\underline{64}$ day of $\underline{988}$, by a vote of $\underline{5-1}$.

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Dorothy M. Gunn, Clerk Illinois Pollution Control Board