

ILLINOIS POLLUTION CONTROL BOARD
March 24, 1988

RICK MOORE, ELEANOR MORRIS and)
LEONARD MORRIS,)
)
Petitioners,)
)
v.) PCB 88-24
)
WAYNE COUNTY BOARD and)
DAUBS LANDFILL, INC.,)
)
Respondents.)

ORDER OF THE BOARD (by B. Forcade):

On January 25, 1988, Rick Moore, Eleanor Morris, and Leonard Morris (hereinafter "Petitioners") filed a petition for review of the Wayne County Board's (hereinafter "Wayne County") December 22, 1987 approving the proposed location of Daubs Landfill, Inc. ("Daubs") Landfill No. 3 in that county. The petition for review was timely filed with this Board. By its Order of February 4, 1988, this Board mandated a public hearing which is scheduled to occur March 25, 1988 in Wayne County. Absent receipt of a waiver from Daubs, this matter is due for decision within a few days after this Board's May 19, 1988 meeting. Final filings are currently due no later than April 14, 1988, after which this matter will be first ripe for decision.

Facts

This appeal is of the second of two approvals by Wayne County of the proposed Daubs Landfill No. 3. The first approval by Wayne County occurred September 30, 1986, on a request for landfill siting approval filed by Daubs on April 8, 1986. Wayne County held hearings on that first petition on July 15, 16, 17 and 18, 1986. A group of affected third parties appealed that first approval to this Board on November 3, 1986 ("Daubs 1"). That group of three affected third parties included two of the three present Petitioners in PCB 88-24 ("Daubs 2"). Daubs 1 was assigned PCB 86-197 and a public hearing occurred on December 30, 1986. The PCB 86-197 appeal included issues of fundamental fairness and a substantive attack on the September 30, 1986 decision of Wayne County to approve the proposed landfill site. This Board vacated the Daubs 1 Wayne County approval by its Order of February 19, 1987. This Board (2 members dissenting) determined that Daubs' published notice of a proposed filing of a petition for landfill siting was defective: the accurate narrative description of the proposed landfill location did not cure the defect in the legal description of the site. This Board

held that the defective legal description predominated, so Wayne County lacked jurisdiction to approve the landfill site. Daubs appealed the Daubs 1 decision, and the Fifth District Appellate Court reversed and remanded the case to this Board in an Opinion dated February 19, 1988. The court held that the accurate narrative description of the proposed site constituted the substantial compliance required by such jurisdictional statutory notice provisions which do not mandate use of a legal description of the affected property. The Fifth District still holds the record in the Daubs 1 proceedings and has only in the past day issued its mandate vesting this Board with jurisdiction in that case.

Daubs filed its second request for landfill approval for Landfill No. 3 with Wayne County on July 8, 1987, ostensibly to correct any defects in its initial petition. Wayne County conducted hearings on this second request for approval on November 9, 10, and 18, 1987. Wayne County approved the proposed landfill site on December 22, 1987, and the petitioners filed this present appeal with this Board, now designated PCB 88-24 ("Daubs 2"). Observing the apparent duplicative nature of this second appeal during the pendency of Daubs 1 a February 25, 1988 Order of this Board requested the parties to brief certain issues before March 17, 1988:

1. Whether both Daubs 1 and Daubs 2 involve the same facility;
2. What differences exist between the two proceedings if they involve the same facility;
3. Whether this Board has authority to entertain two parallel proceedings involving the same facility; and
4. Which proceeding this Board should dispose of if it cannot entertain both, and how it should do so.

Daubs responded to this Order on March 7, 1988. It stated that both Daubs 1 and Daubs 2 indeed involve the same proposed facility, but highlighted the different postures of the two proceedings:

1. In Daubs 1 the approval was based on an 8-4 vote of Wayne County, whereas it was based on a 12-3 vote of a county board of different composition in Daubs 2;

2. Daubs 1 involved fundamental fairness and substantive issues, but fundamental fairness does not appear central to Daubs 2;
3. Although both Daubs 1 and Daubs 2 both include two common petitioners, each includes an additional petitioner who is not a party to the other;
4. Different attorneys represent the petitioners in the two proceedings;
5. The record is already closed in Daubs 1, but hearings have not yet occurred in Daubs 2; and
6. This Board must act within the mandate of the Fifth District in Daubs 1.

Daubs believes that this Board could not terminate Daubs 2 without violating the rights of the parties and that this Board must proceed to decide Daubs 1 because of the appellate court's mandate. Daubs felt there was no authority to support denying the petitioner's right to a full decision on the merits in either case. Further, Daubs felt consolidation of these two appeals would create procedural difficulties as a result of their different postures.

The Daubs 2 Petitioners responded to the Order on March 16, 1987 by requesting dismissal of Daubs 1. The Petitioners stated:

The Board apparently has authority to entertain two proceedings, but under the doctrines of mootness, waiver and estoppel, fundamental fairness and administrative efficiency, the Board should not simultaneously entertain two proceedings.

The Petitioners conceded "that there are substantial procedural differences in the posture[s] of the two proceedings ...," and "that consolidation of the two proceedings would result in a 'procedural morass' and that consolidation would not be in the best interests of the parties, nor in the interest of judicial economy, and ... would prejudice the rights of petitioners ...". The Petitioners focused on the fact that both Daubs 1 and Daubs 2 concern the same facility and site. They maintained that the record in Daubs 2 will include "more current data pertaining to site suitability than [that of] the prior application filed in [PCB] 86-197." They conceded that "each proceeding is apparently identical but that the application, evidence, and exhibits ... is substantially different ..., including different expert

witnesses." The Petitioners' major legal argument in favor of dismissal of Daubs 1 is that in correcting the defective notice in its first application for siting approval by filing its second application (Daubs 2) Daubs mooted any controversy in Daubs 1 and/or raised an estoppel to Daubs' continued prosecution of that initial application. They expressed their intent to file a motion to dismiss Daubs 1 on behalf of the two common petitioners when this Board receives the mandate of the Fifth District in that case. The Petitioners conceded that although named as appellees in the Fifth District appeal of Daubs 1, they chose not to appeal that decision. They claim that the opinion of the Fifth District should be vacated and dismissed as a matter of law, and expressed an intent to petition that court for dismissal. The Petitioners cite Concerned Boone Citizens, Inc. v. M.I.G. Investments, Inc., 144 Ill.App.3d 334, 494 N.E.2d 180 (1986) in support of their argument that by filing its second application for landfill siting (PCB 88-24), Daubs mooted the proceedings regarding the first (PCB 86-197).

Neither Wayne County nor the Wayne County State's Attorney have responded to the February 25, 1988 Order.

Discussion

The statutory provision for review of county board approvals of landfill sitings greatly fetters the discretion of this Board. By mandatory language, it states that this Board "shall hear" a petition for review "[u]nless the Board determines that such petition is duplicitous or frivolous, or that the petitioner is so located as to not be affected by the proposed facility..." Ill.Rev.Stat. ch. 111-1/2, section 1040.1(b) (1987). The statute constrains review to the record before the county board, Id., and consideration to the written county board order, the hearings transcripts, and the "fundamental fairness" of the procedures employed by the county board. Ill.Rev.Stat. ch. 111-1/2, section 1040.1(a) (1987). Any evidence extrinsic to the record before the county board may not enter the considerations of this Board during review. Id. No specific language currently in the statute prohibits or limits the filing of multiple requests for landfill siting approval with the appropriate county board.* The conclusion that this Board must subsequently hear the ensuing petitions for review would follow the mandatory language of Section 40.1 of the Act. Only if one of the three statutory criteria are arguably present should this Board deny review:

*SB-749, P.A. 85-945, 1987 Ill.Law 445 (December 2, 1987, effective July 1, 1988), has a provision that bars the filing of a second application within two years of a denial. This new provision provides no guidance in the present case.

1. The petition for review is "frivolous";
2. The petition is "duplicitous"; or
3. The petitioners are not "affected" by the county board action.

While review of both Daubs 1 and Daubs 2 is still co-pending, neither petition is frivolous. This Board is still capable of granting the demanded relief. This situation might change, however, after this Board would affirmatively decide either case. It appears from the statute that Daubs needs only a single valid approval of siting from the county board. Ill.Rev.Stat. ch. 111-1/2, section 1039(c) (1987).

Neither the petition in Daubs 1 nor that in Daubs 2 is "duplicitous" in the sense that it includes resolution of issues from multiple Wayne County orders or proceedings. Each proceeding has an independent record, constitutes independent orders, and is based on independent petitions for siting approval and petitions for review. The respective decisions of this Board are therefore based on independent considerations. The prohibition against consideration of evidence extrinsic to the record developed by the county board would operate to enhance the independence of Daubs 1 and Daubs 2. It appears that this Board could not dismiss one petition for review in favor of the other, nor could it readily consolidate them for decision. Further, any attempt to do so could risk violating the statutory time limit on decision. Ill.Rev.Stat. ch. 111-1/2, section 1040.1(a) (1987).

Finally, the petitioners in both proceedings appear "affected" third parties within the meaning of Section 40.1(b) of the Act. In Daubs 2, one common petitioner purports to reside on and own property within the Section 39.2(b) zone of the proposed landfill site. The other common petitioner purports in Daubs 2 to reside within 3/4 mile of the site. In Daubs 1, all petitioners purport to reside "in the immediate vicinity" of the proposed site. Dismissal is not warranted on this basis.

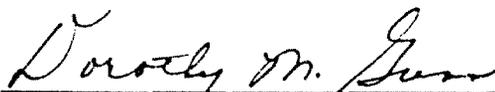
Although the possibility of dismissing either Daubs 1 or Daubs 2 bears some appeal for the resulting reduced workload of this Board, the only issue currently before this Board is the possible dismissal of Daubs 2. Both Daubs and the Petitioners concede that this Board has authority and jurisdiction to continue with Daubs 2. Both maintain that this Board cannot now dismiss Daubs 2 without prejudice to the rights of the Petitioners. Both agree that consolidation of Daubs 2 with Daubs 1 is inappropriate. This Board agrees. The Petitioners' arguments in favor of the dismissal of Daubs 1 are inapposite to the present issue of proceeding with Daubs 2. Further, they ignore two vital facts about Daubs 1: this Board may only decide

that case within the mandate of the Fifth District, and that case is a petition for review of a county board siting approval. The effects of these issues, of those raised in the Petitioners' response to the February 25, 1988 Order, and of the filing of the Daubs 2 application on the justiciability of Daubs 1 are best reserved for when this Board receives the record in Daubs 1 from the Fifth District so that it may proceed according to its mandate. This Board cannot proceed until it receives the record.

For the stated reasons, dismissal of Daubs 2 is inappropriate. This Board will not interfere in the independent progress of Daubs 2 at this time. This decision does not consider or affect this Board's jurisdiction over Daubs 1.

IT IS SO ORDERED

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 24th day of March, 1988, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board