

ILLINOIS POLLUTION CONTROL BOARD
June 17, 1999

ESG WATTS, INC., an Iowa corporation,)	
)	
Petitioner,)	
)	
v.)	PCB 98-2
)	(Pollution Control Facility Siting Appeal)
SANGAMON COUNTY BOARD,)	
)	
Respondent.)	

LARRY A. WOODWARD, OF PETITIONER, CHARLES J. NORTHRUP AND JAMES M. MORPHEW, OF SORLING, NORTHRUP, HANNA, CULLEN & COCHRAN, AND CHARLES F. HELSTEN, OF HINSHAW & CULBERTSON, APPEARED ON BEHALF OF PETITIONER; and

ROBERT L. SMITH AND DWAYNE GAB, ASSISTANT STATE'S ATTORNEYS, SANGAMON COUNTY STATE'S ATTORNEY OFFICE, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by K.M. Hennessey):

Petitioner ESG Watts, Inc. (ESG Watts) has appealed the decision of respondent Sangamon County Board (County Board) to deny ESG Watts' application to expand a landfill. ESG Watts' application concerned an overfilled portion of the Sangamon Valley Landfill in Sangamon County, Illinois.

Today, the Illinois Pollution Control Board (Board) finds that the County Board lacked jurisdiction to hear the siting request. The County Board lacked jurisdiction because ESG Watts failed to provide timely notice of the request to certain property owners entitled to notice. Accordingly, the Board vacates the County Board's decision.

BACKGROUND

ESG Watts operates a solid waste landfill in Sangamon County, Illinois, commonly known as the Sangamon Valley Landfill (Landfill). ESG Watts' Petition (Pet.) at 3. In an enforcement action against ESG Watts filed in the Circuit Court of Sangamon County (People of the State of Illinois and County of Sangamon v. Watts Trucking Service, Inc. and ESG Watts, Inc., No. 91-CH-242 (Cir. Ct. Sangamon Co.)), the court found that the Landfill had been vertically and laterally expanded beyond its permitted boundaries. *Id.*; C13178.¹

¹ Pages in the record of the siting request proceedings before the County Board are cited as "C_."

The size of this overfill is approximately 500,000 cubic yards. Pet. at 3; Exh. 1 at B-1.² The circuit court ordered ESG Watts to excavate and properly dispose of the overfill or, alternatively, obtain local siting approval to leave the overfill in place. Pet. at 3; C13178. Under Section 39.2 of the Environmental Protection Act (Act), 415 ILCS 5/39.2 (1996), an applicant must obtain approval from the county board (or governing body of the municipality) to site a landfill and to expand a landfill.

ESG Watts submitted a siting application for the overfill to the Sangamon County Clerk on December 2, 1996. C13178. On May 31, 1997, the County Board denied the application (C13291)³ and on July 3, 1997, ESG Watts appealed the denial to the Board. ESG Watts asserts that the County Board's decision that ESG Watts failed to meet all of the siting criteria of Section 39.2(a) of the Act was against the manifest weight of the evidence. ESG Watts also argues that the proceedings before the County Board were fundamentally unfair. Pet. at 4-5.

PROCEDURAL MATTERS

The Board accepted this matter for hearing on July 10, 1997. Hearing Officer Kathleen Crowley held the hearing on December 7, 1998.⁴ At its conclusion, ESG Watts waived the deadline under Section 40.1(a) of the Act, 415 ILCS 5/40.1(a) (1996), by which the Board must decide this case from February 28, 1999, to June 30, 1999. Tr. at 114-115.

Based on this waiver, the hearing officer ordered the parties to file posthearing briefs as follows: ESG Watts' brief by January 25, 1999; the County Board's brief by February 16, 1999; and ESG Watts' reply brief by March 2, 1999. Tr. at 115. The hearing officer set forth the briefing schedule in a December 9, 1998 hearing report and stated that the "mailbox rule" of 35 Ill. Adm. Code 101.102(d) did not apply to the filings. The mailbox rule provides that if the Clerk receives a filing "after any due date, the time of mailing shall be deemed the time of filing." 35 Ill. Adm. Code 101.102(d). Notwithstanding the mailbox rule, Section 101.102(e) provides that:

[T]he hearing officer may accelerate a filing schedule to prevent undue delay, upon written notice to the participants or parties. The notice will specify a date

² ESG Watts' exhibits from the siting request hearing before the County Board are cited as "Exh. _."

³ The parties do not appear to dispute the date of the County Board's decision. The Board notes that ESG Watts refers to the date of the County Board's decision alternately as May 30, 1997, (Pet. at 4) and May 31, 1997, (ESG Watts' January 25, 1999 Brief at 7-8). The Board also notes that the resolution in which the County Board denied the siting request is stamped as having been filed with the Sangamon County Clerk on May 30, 1997. C13290. However, the resolution itself (C13291) and the County Board's meeting agenda (C13284), roll call (C13285), and minutes (C13286) refer to May 31, 1997.

⁴ The transcript of the hearing is cited as "Tr. at _."

by which the document must be received in the Clerk's office. 35 Ill. Adm. Code 101.102(e).

The hearing officer did so here. Accordingly, the briefs would not be timely filed unless the Clerk received them by their respective due dates.

On December 28, 1998, ESG Watts waived the decision deadline to July 30, 1999. ESG Watts timely filed its briefs. The County Board did not file its brief on time. The County Board mailed its brief to the Clerk on February 16, 1999; the Clerk received it on February 18, 1999.

On February 22, 1999, ESG Watts moved the Board to strike the County Board's brief (Motion). The County Board did not respond to the Motion. ESG Watts argues that the County Board violated the hearing officer's order by not filing its brief on time. Motion at 2-3. ESG Watts asserts that the Board should strike the County Board's brief under the Board's procedural rule on sanctions, 35 Ill. Adm. Code 101.280. *Id.* at 3.

The Board denies the Motion. The hearing officer provided that the mailbox rule would not apply to these filings to allow the Board to fully review the briefs before the decision deadline of June 30, 1999. However, ESG Watts subsequently extended the Board's decision deadline to July 30, 1999. The arrival of the County Board's brief two days late did not cause material delay or prejudice. Under these circumstances, the Board finds that the sanction of striking the brief is not warranted.

JURISDICTION

A threshold issue in this case is whether the County Board had jurisdiction to hear ESG Watts' siting request. In this section, the Board (1) sets forth the applicable statutory language, (2) sets forth the facts relating to jurisdiction, and (3) discusses the Board's conclusions on jurisdiction.

Statutory Framework

Section 39.2(b) of the Act provides:

No later than 14 days prior to a request for location approval the applicant shall cause written notice of such request to be served either in person or by registered mail, return receipt requested, . . . on the owners of all property within 250 feet in each direction of the lot line of the subject property, said owners being such persons or entities which appear from the authentic tax records of the County in which such facility is to be located 415 ILCS 5/39.2(b) (1996).

Facts

ESG Watts attempted to serve notice of its siting request on persons or entities entitled to notice under Section 39.2(b) of the Act. Under Section 39.2(b), each property owner within 250 feet of the lot lines of the parcels that contain the Landfill was entitled to notice. See Environmental Control Systems, Inc. v. Long, 301 Ill. App. 3d 612, 623, 703 N.E.2d 1001, 1009 (5th Dist. 1998), *appeal denied*, 1999 Ill. LEXIS 477 (March 31, 1999).⁵

The tax assessor's records showed that the Illinois Terminal Society (Society), James Oldani (Oldani), Lucille Weigland (Weigland), Alita Paoni (Paoni), William and Mary Shures, and Vivian McGill (McGill), among others, own property within 250 feet of the lot lines of the parcels that contain the Landfill. County Board March 27, 1997 Hearing Tr. at 14, 18-19;⁶ Exh. 1, Exh. B, App. P; Exh. 2; Exh. 6. ESG Watts' attempts to serve each of these persons or entities is outlined in turn below.

The Society

ESG Watts sent notice of its siting request to the Society on November 14, 1996, by registered mail, return receipt requested. Exh. 1, App. P. The Society received the notice on November 19, 1996, as evidenced by signature on the return receipt. Exh. 1, App. P; Exh. 6. ESG Watts did not attempt to personally serve the notice on the Society. *Id.*

Oldani

ESG Watts sent notice of its siting request to Oldani on November 14, 1996, by registered mail, return receipt requested. Exh. 1, App. P. ESG Watts unsuccessfully attempted to serve the notice on Oldani in person once on each of November 18, 19, and 25, 1996, and twice on each of November 20 and 22, 1996. *Id.* Oldani received the notice on December 7, 1996, as evidenced by signature on the registered mail return receipt. County Board March 27, 1997 Hearing Tr. at 9-10; Exh. 2; Exh. 6.

Weigland

ESG Watts sent notice of its siting request to Weigland on November 14, 1996, by registered mail, return receipt requested. Exh. 1, App. P. ESG Watts unsuccessfully attempted to serve the notice on Weigland in person on November 20, 1996, and on one other occasion, the date of which is not shown in the record. *Id.* Weigland received the notice on

⁵ The parties do not appear to dispute that the "subject property" constitutes the parcels that contain the entire Landfill, including the area of the existing fill and the overfill, and two other fill areas permitted for landfill development. County Board March 27, 1997 Hearing Tr. at 18 (see following footnote); Exh. 1, Exh. B, App. N and P, Att. V. The Board finds this interpretation consistent with the statute and precedent. See Land and Lakes Company v. Village of Romeoville (August 26, 1991), PCB 91-7, slip op. at 12 (finding that the "subject property" was the parcel that contained the landfill and a proposed expansion).

⁶ The transcript of the siting request hearing before the County Board is cited as "County Board __, 1997 Hearing Tr. at __."

November 25, 1996, as evidenced by signature on the registered mail return receipt. Exh. 1, App. P; Exh. 6.

Paoni

ESG Watts sent notice of its siting request to Paoni on November 14, 1996, by registered mail, return receipt requested. Exh. 1, App. P. The mail was returned to sender because it was unclaimed. Exh. 2. ESG Watts unsuccessfully attempted to serve the notice on Paoni in person on each of November 19 and 20, 1996, and on one other occasion, the date of which is not shown in the record. Exh. 1, App. P. ESG Watts delivered the notice to Paoni in person later on November 20, 1996. Exh. 1, App. P; Exh. 6.

The Shures

ESG Watts sent separate notices of its siting request to William and Mary Shures on November 14, 1996, by registered mail, return receipt requested. Exh. 1, App. P. Both pieces of mail were returned to sender because they were unclaimed. Exh. 2. ESG Watts left copies of the notices at the Shures residence with Mary Shures on November 19, 1996. Exh. 1, App. P; Exh. 6. ESG Watts made an earlier attempt to personally serve the Shures, but the record does not show when this attempt took place. Exh. 1, App. P.

McGill

Finally, ESG Watts sent notice of its siting request to McGill on November 14, 1996, by registered mail, return receipt requested. Exh. 1, App. P. The mail was returned to sender because it was unclaimed. Exh. 2. In a November 21, 1996 telephone conversation between McGill and a person attempting to personally serve the notice on behalf of ESG Watts, McGill stated that her property had been sold to her grandson, Ronald W. Brown, Jr. (Brown). Exh. 1, App. P. At McGill's instruction, a copy of the notice was left in the mailbox for Brown to pick up. *Id.* The tax assessor's records did not show that Brown owns property within 250 feet of the lot lines of the parcels containing the Landfill. County Board March 27, 1997 Hearing Tr. at 21.

Filing of Siting Application

ESG Watts submitted its siting application to the Sangamon County Clerk on December 2, 1996. C13178. On December 20, 1996, the Sangamon County Clerk certified to ESG Watts that:

[T]he application for site location approval for the Sangamon Valley Landfill Area I overfill is complete and has been accepted for filing. The designated date of the filing is DEC. 20, 1996. Exh. 8.

Discussion

“The notice requirements contained in section 39.2(b) . . . are jurisdictional prerequisites which must be followed in order to vest the county board with the power to hear a landfill proposal.” Kane County Defenders, Inc. v. Pollution Control Board, 139 Ill. App. 3d 588, 593, 487 N.E.2d 743, 746 (2d Dist. 1985); see also Ogle County Board v. Pollution Control Board, 272 Ill. App. 3d 184, 193, 649 N.E.2d 545, 552 (2d Dist. 1995) (“[C]ompliance with the individual notice requirements of section 39.2(b), as with the publication notice requirements, is a jurisdictional prerequisite to a county board’s authority to act over a given landfill proposal.”). Accordingly, if ESG Watts failed to meet the notice requirements of Section 39.2(b), the County Board lacked jurisdiction to hear this matter and the Board must vacate the County Board’s decision on ESG Watts’ siting application.⁷ To determine if ESG Watts met the notice requirements, the Board must consider (1) the date of ESG Watts’ request for location approval; and (2) the date of service of the siting request notice.

Date of the Request for Location Approval

Under Section 39.2(b) of the Act, a siting applicant must serve notice of its siting request on property owners entitled to notice. A siting applicant must serve the notice “[n]o later than 14 days prior to a request for location approval.” 415 ILCS 5/39.2(b) (1996).

The County Board asserts that the date of the request for location approval (siting request or application) is December 2, 1996. County Board’s Brief at 2. ESG Watts does not dispute that it submitted its application to the Sangamon County Clerk on December 2, 1996. However, ESG Watts argues that the date of its siting request is December 20, 1996, because of a Sangamon County ordinance. ESG Watts’ Reply Brief at 2-3. The ordinance provides:

The time period designated in Section 39.2 of the Act shall not commence until the applicant has been informed that the application for site location approval is

⁷ Because the question of jurisdiction is a legal question, the Board will review it *de novo*. Contrary to ESG Watts’ claim (see Pet. at 4), the manifest weight of the evidence standard does not apply to jurisdictional questions. See Carmichael v. Browning-Ferris Industries of Illinois, Inc. and Ogle County Board (December 16, 1993), PCB 93-114, slip op. at 2.

complete, and the applicant shall have submitted thirty-five additional copies of the completed application to the office of the county clerk. Upon receipt of the additional copies of the application, the office of the county clerk shall provide the applicant with a receipt and certification that the application has been accepted for filing, designating the date of filing. *Id.*

The Sangamon County Clerk certified to ESG Watts that the filing date for the site application was December 20, 1996.

According to ESG Watts, if December 20 is the date of the siting request under Section 39.2(b) of the Act, it timely served all property owners entitled to notice except for Oldani. ESG Watts' Reply Brief at 3. ESG Watts asserts that its failure to timely serve Oldani does not divest the County Board of jurisdiction because ESG Watts made reasonable attempts to serve him. *Id.*

The Board finds that the date of the siting request is the date the local government receives the siting request, rather than the "filing date" established by ordinance. This finding comports with a common sense reading of Section 39.2(b) and with the language of Section 39.2 as a whole. In particular, Section 39.2(d) contains another deadline that is keyed to the date that the local government receives the siting request; it requires the local government to hold a public hearing on the siting request no sooner than 90 days but no later than 120 days "from receipt of the request for site approval." 415 ILCS 5/39.2(d) (1996). The Board cannot conceive of any reason why the legislature would have these two deadlines measured from different dates. Such a scheme would foster confusion without any apparent benefit.

In addition, the Board has found that the date on which the local government receives the siting request is the date from which to measure the 14-day deadline under Section 39.2(b). For example, in Carmichael v. Browning-Ferris Industries of Illinois, Inc. and Ogle County Board (October 7, 1993), PCB 93-114, *aff'd sub nom. Ogle County Board v. Pollution Control Board*, 272 Ill. App. 3d 184, 649 N.E.2d 545 (2d Dist. 1995), the Board stated:

Here, [the applicant's] request for approval was received by the County November 13, 1992. Therefore the 14-day deadline for notice pursuant to Section 39.2(b) of the Act was October 30, 1992. Carmichael v. Browning-Ferris Industries of Illinois, Inc. and Ogle County Board (October 7, 1993), PCB 93-114, slip op. at 6, *aff'd sub nom. Ogle County Board v. Pollution Control Board*, 272 Ill. App. 3d 184, 649 N.E.2d 545 (2d Dist. 1995).

The Board further notes that if local ordinances determined the date of the siting request under Section 39.2, local governments could manipulate the siting review process for purposes contrary to the Act. In addition, the meaning of Section 39.2 could vary across the State. The legislature did not intend such an outcome:

The siting approval procedures . . . provided for in this Act for new pollution control facilities shall be the exclusive siting procedures . . . for facilities subject to this Act. 415 ILCS 5/39.2(g) (1996).

While a local government may establish certain procedures for local siting review if the Act does not establish procedures (see Waste Management of Illinois, Inc. v. Pollution Control Board, 175 Ill. App. 3d 1023, 1035-1036, 530 N.E.2d 682, 692-693 (2d Dist. 1988)), in this case the Act does provide procedures. Accordingly, those procedures determine the date of the siting request.

Date of Service of the Siting Request Notice

Under Section 39.2(b) of the Act, ESG Watts was required to serve notice of its siting request on all property owners entitled to notice no later than 14 days before December 2, 1996, *i.e.*, by November 18, 1996. The County Board asserts that it lacked jurisdiction to hear the siting request because ESG Watts did not serve the notice on the Society, Oldani, Weigland, Paoni, the Shures, or Brown by November 18. County Board's Brief at 1-2. ESG Watts maintains that even if December 2, 1996, is the date of the siting request, the County Board had jurisdiction because ESG Watts made reasonable attempts to serve all of these property owners. ESG Watts' Reply Brief at 4.

Under Section 39.2(b), the applicant must serve property owners entitled to notice "either in person or by registered mail, return receipt requested." 415 ILCS 5/39.2(b) (1996). Although the Board has held that an applicant can satisfy this requirement by mailing the notice "sufficiently far in advance to reasonably expect receipt of notice 14 days in advance of the filing of a notice" (City of Columbia v. County of St. Clair (April 3, 1986), PCB 85-177, 85-220, 85-223, slip op. at 13), the appellate court in Ogle County Board adopted a different view:

[i]f mere mailing of a . . . notice [were] sufficient service, then proof of mailing would be all that was required to show service, and there would be little reason to require a returned receipt. Ogle County Board, 272 Ill. App. 3d at 196, 649 N.E.2d at 554 (quoting Avdich v. Kleinert, 69 Ill. 2d 1, 9, 370 N.E.2d 504, 508 (1977)).

Instead, the appellate court held:

[T]he "return receipt requested" provision of section 39.2(b) of the Act reflects the intent of the legislature to require actual receipt of the notice, as evidenced by the signing of the return receipt. Ogle County Board, 272 Ill. App. 3d at 196, 649 N.E.2d at 554.

In Ogle County Board, the return receipts were signed after the notice deadline had expired, and the court found that the notice did not comply with the requirements of Section 39.2(b). The court therefore upheld the Board's finding that the local government lacked jurisdiction to

hear the siting application. See Ogle County Board, 272 Ill. App. 3d at 196, 649 N.E.2d at 554. However, the court expressed “no opinion whether a potential recipient who refuses to sign a receipt of notice may be held to be in constructive receipt of the notice for purposes of the statute.” Ogle County Board, 272 Ill. App. 3d at 196, 649 N.E.2d at 554.

Here, ESG Watts made no attempt to personally serve the notice on the Society. Instead, ESG Watts sent the notice to the Society by registered mail, return receipt requested. ESG Watts sent the notice to the Society on November 14, 1996, and the Society received it on November 19, 1996, as evidenced by signature on the return receipt. There is no indication that the Society sought to thwart service.

The Board finds that for purposes of Section 39.2(b), ESG Watts served the Society on November 19—one day after the 14-day deadline. Because ESG Watts missed this deadline, the County Board lacked jurisdiction to hear the siting request. See Browning-Ferris Industries of Illinois, Inc. v. Pollution Control Board, 162 Ill. App. 3d 801, 805, 516 N.E.2d 804, 807 (5th Dist. 1987) (because the notice requirements of Section 39.2(b) are jurisdictional, even a one-day deviation renders a local government without jurisdiction to hear a siting request).

ESG Watts’ failure to timely serve one property owner is sufficient to divest the County Board of jurisdiction. See Ogle County Board, 272 Ill. App. 3d at 195, 649 N.E.2d at 553 (“[T]he failure to notify any party entitled to statutory notice will divest the County Board of jurisdiction over the landfill application.”). However, the Board will address the service of the other property owners in the interest of judicial economy.

The record shows that Oldani, Weigland, Paoni, and the Shures did not receive the notice by November 18, 1996. Therefore, ESG Watts could not be found to have complied with Section 39.2(b) of the Act with respect to these property owners unless the Board finds that “constructive receipt” suffices under Section 39.2(b), and these property owners were in fact in constructive receipt of the notice by November 18, 1996.

The Board finds that the Ogle County Board court left open the question of whether a property owner can be found in constructive receipt of a notice. The Board believes that the requirements of Section 39.2(b) can be met through constructive receipt. If a property owner does not receive the notice on time, he or she nonetheless may be deemed to be in constructive receipt of a notice if the property owner refuses service before the deadline. Otherwise, a recalcitrant property owner could forever frustrate attempts to obtain a hearing on a request for siting approval. The Board finds that such a result is not consistent with Section 39.2. The Board further notes that the concept of constructive receipt is recognized and accepted under another Illinois statute. See Helland v. Larson, 138 Ill. App. 3d 1, 4-5, 485 N.E.2d 457, 459-460 (3d Dist. 1985) (recognizing constructive receipt under the Forcible Entry and Detainer Act).

In this case, however, the Board cannot find these property owners in constructive receipt of the notice before the deadline. ESG Watts sent the notice by registered mail, return receipt requested, to Oldani, Weigland, Paoni, and the Shures four days before the deadline.

ESG Watts then sought to personally serve these property owners, but these attempts took place after the deadline, with the exception of ESG Watts' attempt to serve Oldani. ESG Watts first attempted to personally serve Oldani on the deadline day—November 18, 1996. The Board finds that there is no evidence that these property owners refused service. Therefore, these property owners were not in constructive receipt of the siting request notice before the deadline.

Finally, the only property owners entitled to notice are those who “appear from the authentic tax records of the County in which such facility is to be located.” 415 ILCS 5/39.2(b) (1996). The tax assessor's records did not show that Brown owns property within 250 feet of the lot lines of the parcels that contain the Landfill. Accordingly, ESG Watts was not required to serve Brown and any failure to timely serve him would not deprive the County Board of jurisdiction.

CONCLUSION

The County Board lacked jurisdiction to hear the siting request because ESG Watts failed to satisfy the notice requirements of Section 39.2(b) of the Act. Accordingly, the Board will vacate the County Board's decision on ESG Watt's siting application. The Board need not address any other issues that the parties have raised because the Board's decision on jurisdiction is dispositive of this case. See Kane County Defenders, 139 Ill. App. 3d at 590, 593, 487 N.E.2d at 745, 747. The Board also need not reach the question of whether, under Section 39.2 of the Act, a landfill can obtain siting approval for waste that is already in place.

This opinion constitutes the Board's findings of fact and conclusions of law.

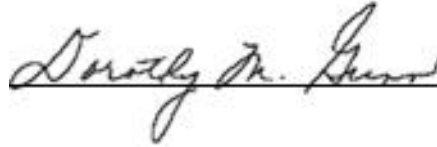
ORDER

The Board vacates the May 31, 1997 decision of the Sangamon County Board denying the application of ESG Watts, Inc. for siting approval for an overfilled portion of the Sangamon Valley Landfill in Sangamon County, Illinois.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 172 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 17th day of June 1999 by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board