ILLINOIS POLLUTION CONTROL BOARD
August 7, 2003

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| CITY OF KANKAKEE,<br><br>Petitioner,<br><br>v.<br><br>COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC.,<br><br>Respondents. | ) | PCB 03-125<br>(Third-Party Pollution Control Facility Siting Appeal) |

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| MERLIN KARLOCK,<br><br>Petitioner,<br><br>v.<br><br>COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC.,<br><br>Respondents. | ) | PCB 03-133<br>(Third-Party Pollution Control Facility Siting Appeal) |

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| MICHAEL WATSON,<br><br>Petitioner,<br><br>v.<br><br>COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC.,<br><br>Respondents. | ) | PCB 03-134<br>(Third-Party Pollution Control Facility Siting Appeal) |

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| KEITH RUNYON, | ) | |
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| Petitioner, | ) | |
| | ) | |
| v. | ) | PCB 03-135 |
| | ) | (Third-Party Pollution Control Facility |
| COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC., | ) | Siting Appeal) |
| | ) | |
| Respondents. | ) | |

KENNETH A. LESHEN AND L. PATRICK POWER APPEARED ON BEHALF OF CITY OF KANKAKEE;

GEORGE MUELLER OF GEORGE MUELLER, P.C. APPEARED ON BEHALF OF MERLIN KARLOCK;

JENNIFER J. SACKETT POHLENZ AND DAVID J. FLYNN OF QUERREY & HARROW, LTD. APPEARED ON BEHALF OF MICHAEL WATSON;

KEITH RUNYON APPEARED ON BEHALF OF HIMSELF;

RICHARD S. PORTER OF HINSHAW & CULBERTSON AND ELIZABETH S. HARVEY OF SWANSON, MARTIN & BELL APPEARED ON BEHALF OF THE COUNTY OF KANKAKEE; and

DONALD J. MORAN OF PEDERSEN & HOUPT APPEARED ON BEHALF OF WASTE MANAGEMENT OF ILLINOIS, INC.

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

The petitioners in each of these consolidated cases filed separate appeals of a January 31, 2003 decision by the County of Kankakee (County) to site a pollution control facility owned and operated by Waste Management of Illinois, Inc. (Waste Management). As discussed in the opinion below the applicant, Waste Management, failed to properly notify all landowners pursuant to Section 39.2(b) of the Environmental Protection Act (Act) (415 ILCS 5/39.2(b) (2002)), and, therefore, the County lacked jurisdiction to review the siting application. Since the County lacked jurisdiction, the Board vacates the decision by the Kankakee County Board granting siting for the expansion of the facility owned and operated by Waste Management. Finally, the Board will not decide the remaining issues in this case because the Board finds that the County lacked jurisdiction to review the siting application.

## PROCEDURAL HISTORY

On February 25, 2003, City of Kankakee (City) filed a petition asking the Board to review the January 31, 2003 decision of the County. On March 3, Merlin Karlock (Karlock), Michael Watson (Watson), and Keith Runyon (Runyon) all filed separate petitions asking the Board to review the January 31, 2003 decision of the County. The County granted Waste Management's application to site a pollution control facility in Kankakee County. On March 6, 2003, the Board consolidated the appeals and accepted the matters for hearing.

On April 14, 2003, the County filed the record in this proceeding. Hearings were held before Board Hearing Officer Bradley Halloran on May 5, 2003 and May 6, 2003, in Kankakee. On June 2, 2003 and July 3, 2003, Watson filed a brief and a reply. On June 2, 2003 and July 1, 2003, the City filed a brief and a reply. Runyon and Karlock each filed a brief and reply on June 2, 2003 and July 3, 2003, respectively. The County and Waste Management filed a brief on June 23, 2003.[1]

## PRELIMINARY MATTERS

There are several motions pending before the Board. First, both the County and Waste Management filed motions seeking leave to file briefs in excess of the page limits set forth in the Board's procedural rules at 35 Ill. Adm. Code 101.302(k). Given the complexity of this case, the Board grants the motion.

The County also filed a motion on June 23, 2003, seeking to strike the briefs of Watson and Karlock. On July 3, 2003, Karlock filed a response and on July 7, 2003, Watson filed a response. The County argues that the briefs should be stricken because both briefs exceed the page limits set forth in the Board's procedural rules and Karlock's brief was received by the County after the deadline set by the hearing officer. The Board denies the motion. Although neither brief sought leave of the Board to file briefs in excess of the page limits set in the Board's procedural rules, the Board believes that the briefs are necessary to assist in the complete development of the record before the Board in this complex case.

On July 30, 2002, the County filed a motion to compel payment of record costs (Mot.). On August 7, 2003, the County withdrew the motion to compel as to the City only. Therefore, the Board will address the motion to compel as to Watson only. On August 4, 2003, Watson filed a "Notice of Intent to File a Response" to the motion to compel. In addition Waste Management has filed a waiver of the decision deadline until September 4, 2003 in this case. The Board appreciates Watson's desire to respond, however, the Board is not persuaded of the necessity to delay the decision in this case so that the parties can respond to the motion to

[1] The City's brief will be cited as "CityBr. at" and the reply will be cited as "City Reply at". Watson's brief will be cited as "Watson Br. at" and the reply will be cited as "Watson Reply at". Karlock's brief will be cited as "Karlock Br. at" and the reply will be cited as "Karlock Reply at". The County's brief will be cited as "County Br. at" and Waste Management's brief will be cited as "WMII Br. at". The County record will be cited as "C".

compel. As discussed below, the statute is clear and Watson is responsible for paying a share of the costs of preparing and certifying the record in this matter.

Section 39.2(n) of the Act requires that petitioners in a third-party appeal must pay to the County the cost of preparing and certifying the record. 415 ILCS 5/39.2(n) (2002); 35 Ill. Adm. Code 107.306. The only exception in the Act and Board rules is that citizens' groups are not required to pay for the costs of preparing and certifying the record. 415 ILCS 5/39.2(n) (2002); 35 Ill. Adm. Code 107.306. The County argues that because Watson is the owner of United Disposal, a competing disposal facility, Watson is not exempt under Section 39.2(n) of the Act and must pay a portion of the costs. Mot. at 3. The County did not assess costs for record preparation against Karlock and Runyon because they are citizens. Mot. at 1-2. The County asks the Board to compel Watson to pay a portion of the costs associated with the preparation of the record on appeal. If Watson fails to pay his share of costs, the County asks that the Board dismiss the appeals of Watson pursuant to Section 39.2(n) of the Act (415 ILCS 5/39.2(n) (2002)) and Section 3-109 of the Code of Civil Procedure (735 ILCS 5/3-109 (2002)).

The Board's procedural rules state that "unless undue delay or material prejudice would result" the Board will not decide a motion before the expiration of 14 days. 35 Ill. Adm. Code 101.500(d). The Board finds that undue delay will result if the Board fails to rule on this motion in today's order. The Board stated in the March 6, 2003 order that "[p]etitioners must pay to the County the cost of preparing and certifying the record." Section 39.2(n) of the Act (415 ILCS 5/39.2(n) (2002)) is unambiguous and requires non-citizen petitioners to bear the costs for preparing and certifying the record on appeal. Therefore, the Board reiterates the finding that the Watson as non-citizen petitioners (C1271 at 65) must pay for the preparation of the County record.

Watson also filed a motion to strike public comments three and four on June 20, 2003. On June 23, 2003, the County filed a response to the motion. The Board denies the motion to strike.

## STATUTORY BACKGROUND

Section 40.1(b) of the Act provides:

> If the county board . . . grants approval under section 39.2 of this Act, a third party other than the applicant who participated in the public hearing conducted by the county board . . . may within 35 days after the date on which the local siting authority granted siting approval, petition the Board for a hearing to contest the approval of the county board . . . . 415 ILCS 5/40.1(b) (2002).

Section 39.2(b) of the Act provides:

> No later than 14 days before the date on which the county board or governing body of the municipality receives a request for site 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 the subject

> area not solely owned by the applicant, and on 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) (2002).

## FACTS

On August 16, 2002, Waste Management submitted an application for siting approval to the County. C43-44. The siting application was for an expansion of an existing 179-acre site located at 6259 South US Route 45/52, Kankakee County. C1 at Criterion 1, 1-1. The expansion would increase the site to 664 acres including a 302-acre disposal site. C1 at Criterion 1 at 1-1; Criterion 2 1-1, 3-1. The expansion includes all of the existing 179 acres. C1 at executive summary.

The application included an affidavit indicating that Donald J. Moran representing Waste Management served notice "by certified mail, return receipt requested, and by regular mail on the owners of all property within 1,000 feet in each direction of the lot line of the subject site, said owners being such persons or entities which appear from the authentic tax records of Kankakee County. . . ." C1 at Tab A. The application indicated that Mr. Richard J. Mehrer, Mr. Robert Keller and Mrs. Brenda Keller were all served by personal service. C1 Tab A Exh. B. Mr. Merlin Karlock was served by regular mail. *Id.* Mr. Mehrer and Mr. and Mrs. Keller were all served personally by posting the notice on doors of the domiciles at the address listed on the authentic tax records. *Id.*

Siting hearings were held on the application from November 18, 2002 through December 6, 2002. C1244 through C1271. At hearing supplemental affidavits by Mr. Moran were submitted. C208 –350. In those filings, the service on Mr. Karlock is shown to have been accomplished by certified mail and the receipt signed on July 27, 2002. C219, 229. The supplemental affidavit also indicates that service by certified mail was attempted on Mr. Mehrer, who is deceased. C215, 233. Furthermore, the return receipt for Mr. Mehrer shows his address crossed out and a forwarding address inserted. C233. The return receipt was signed and returned to Waste Management. *Id.*

The affidavits submitted at hearing indicate that notice was mailed to Mr. Keller by certified mail return receipt requested; however, the letter was returned unclaimed. C468-469. Mrs. Keller was not notified by certified mail and the record contains no evidence that a certified letter was mailed to Mrs. Keller. C1271 at 144. Mr. Ryan Jones attempted to serve the notice personally at the address listed on the authentic tax records for Mr. and Mrs. Keller (765 6000 South Road). Mr. Jones attempted service on July 29, 2002, at 6:13 p.m., on July 30, 2002, at 1:03 p.m., July 31, 2002, at 2:34 p.m. and 8:40 p.m., and at 12:19 p.m. on August 1, 2002. C462, C1271 at 7-12. Mr. Jones posted the notice to both Mr. and Mrs. Keller on August 1, 2002, at 765 6000 South Road. C464.

Mr. Jones and Mr. and Mrs. Keller all testified at the siting hearing before the County. *See* C1271 at 1-136. On one of Mr. Jones' attempts to serve Mr. and Mrs. Keller a woman answered the door, but refused to give her name. C1271 at 10-11. Mr. Jones posted the notice

using packing tape on the side door of the residence. C1271 at 13. Mr. Jones stated that generally he has "the best luck serving people after 5 p.m." as that is when most people are home. C1271 at 24.

Mrs. Keller signed an affidavit and testified that she did not receive notice of the siting hearings. C1271 at 61-81; C347, C624. Mrs. Keller works from 7 a.m. to 3:30 p.m. and was at work on the day that Mr. Jones encountered the unidentified female at her home. C127159-60. Mrs. Keller had never seen Mr. Jones and stated that he never attempted to serve her. C1271 at 61. Mrs. Keller did not see a notice posted on her side door on August 1, 2002. C1271 at 73-74. Mrs. Keller at no time refused service of any document attempted to be served by Waste Management. C1271 at 93, C347, C624. Mrs. Keller did pick up a certified letter in March, when Waste Management sent notices for a prior siting application filed in March 2002. C1271 at 62.

Mrs. Keller admitted that her husband and she knew Mr. Watson and her husband drove a truck for Mr. Watson on occasion. C1271 at 63-67. Mr. Keller does not receive compensation for driving the truck for Mr. Watson. *Id*. Mrs. Keller did not prepare her affidavit, which was given to her by Mr. Watson. C1271 at 77-79. Mrs. Keller read the affidavit before signing the affidavit. C1271 at 79. Mrs. Keller had no discussions with Mr. Watson about the affidavit other than his asking her to sign the affidavit. C1271 at 77-80.

Mr. Keller also testified and signed an affidavit. C1271 at 101-136, C348, C623. Mr. Keller did not receive notice of the siting application. *Id*. Mr. Keller works from 7 a.m. until 3:30 p.m. unless there is a large order and then he works longer hours. C1271 at 103. Mr. Keller did not avoid service of the notice application and he did not receive notification of a letter by certified mail. C1271 at 103, 121. Mr. Keller also did not prepare his affidavit and the affidavit was prepared at Mr. Watson's request. C1271 at 111, 118-121, 127. Mr. Keller read the affidavit prior to signing the affidavit. C1271 at 127.

Mr. Keller picks up most of the family's mail at a post office box. C1271 at 105- 108. The mail received at 765 6000 South Road is generally junk mail, but Mr. Keller goes through the mail received there. C1271 at 106l. Mrs. Keller does not pick up the mail either at the post office box or at the mailbox located at 765 6000 South Road. C1271 at 107. The certified letter giving notice of the application in March was received at 765 6000 South Road and Mr. Keller sent Mrs. Keller to pick up the certified letter. C1271 at 107-108.

## ISSUE

The Board must first determine whether the notice requirements of Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)) were met. Failure to meet the strict notice requirements of Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)) divests the County Board of jurisdiction to hear the matter. Browning Ferris Industries of Illinois v. PCB, 162 Ill. App. 3d 801, 805, 516 N.E.2d 804, 807 (5th Dist. 1987); Ogle County Board v. PCB, 272 Ill. App. 3d 184, 649 N.E.2d 545 (2nd Dist 1995) (Ogle County). A jurisdictional defect is dispositive of a case *ab initio*. Illinois Power Co. v. PCB, 137 Ill. App. 3d 449, 484 N.E.2d 898 (4th Dist. 1985); Kane County Defenders, Inc. v. PCB, 139 Ill. App. 3d 588, 487 N.E.2d 743 (2nd Dist. 1985). Therefore, if

petitioners prevail on the issue of failure to properly notice the property owners, the remaining issues are mooted.

## ARGUMENTS

Three of the petitioners raise the issue of inadequate notice pursuant to Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)). Petitioner Runyon did not raise the issue. The following section will summarize the arguments of Watson, Karlock, and the City. Next the Board will summarize the responses of the County and Waste Management.

### Watson's arguments

Watson first raises the issue of the standard of review to be used by the Board in deciding if the notice requirements of Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)) were met. Watson Br. at 3. Watson argues that the Board should use the *de novo* standard of review when deciding if the County Board had jurisdiction. Watson in the reply cites to Geneva Community Unit School District No. 302 v. Property Tax Appeal Board, 695 N.E.2d 561, 564 (2nd Dist. 1998) in support of Watson's argument. Watson Reply at 2. Watson argues that Waste Management's reliance on Land and Lakes v. PCB, 319 Ill. App. 3d 41; 743 N.E.2d 188 (3rd Dist. 2000) (Land and Lakes) is misplaced. *Id*.

Watson argues that Waste Management failed to serve Robert and Brenda Keller who are both named on the authentic tax records for Kankakee County. Watson Br. at 5. Watson argues that the Kellers were not served either by certified mail or personal service and did not receive prefiling notice of the application. *Id.*

Watson asserts that personal service is complete when the notice is delivered to the intended recipient in person. Watson Br. at 7, citing Ogle County. Watson notes that the Illinois Code of Civil Procedure does allow for a summons to be served by leaving a copy at the place of abode with a member of the family under certain circumstances. Watson Br. at 7-8, citing 735 ILCS 5/2-203(a)(2). Watson concedes that the prefiling notice, in a pollution control facility siting proceeding, is not a summons. However, as both the Act and the Code of Civil Procedure require receipt, Watson asserts that the two are analogous. *Id*.

Watson asserts that the plain language of Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)) requires that appropriate service means receipt. Watson Br. at 8, citing Ogle County. Watson maintains that neither Brenda nor Robert Keller received notice and both their affidavits and their testimony remained consistent. Watson Br. at 8. Watson argues that the Kellers did not receive notice by certified mail, personal service, regular mail, registered mail, newspaper, or by posting. *Id*. The first time Mr. Keller found out that the application had been filed was two Saturdays before the public hearings began; Watson asserts that this was three months after the Kellers should have received notice. *Id.*

Watson argues that Waste Management's attempts to personally serve the Kellers four days prior to the deadline for service under Section 39.2 of the Act (415 ILCS 5/39.2(b) (2002)) were unreasonable. Watson Br. at 10. Watson points to ESG Watts v. Sangamon County Board

PCB 98-2 (June 17, 1999) (ESG Watts) to support this argument. Watson asserts that attempting service four days before the deadline was not reasonable in ESG Watts and it is not reasonable here. *Id*. Further, the attempts to serve the Kellers were all made on weekdays and except for two attempts occurred during regular working hours. Watson Br. 10. Watson points out the Mr. Jones himself testified that he generally has better luck serving people after 5 in the evening. *Id*. In addition no other attempts were made to contact or find the Kellers so that they could be personally served and Watson argues the Board should find Waste Management's attempts at service unreasonable. Watson Br. at 10-11.

Watson argues that the certified receipt presented at the siting hearing which is an "alleged unclaimed certified letter addressed to Robert Keller" should not have been admitted to evidence. Watson Br. at 11. Watson argues there was no foundation for the evidence and the evidence is simply a certified mailing with no actual evidence of ever being mailed, and has a check that letter was unclaimed. *Id*. In any event Watson argues that the certified mailing receipt is not evidence of attempted service on Brenda Keller. Watson Br. at 12.

Watson asserts that the record contains no evidence that either of the Kellers was recalcitrant; therefore posting was not valid service. Watson Br. at 12. Watson concedes that the Board has decided a line of cases which would seem to be an exception to the absolute receipt requirement of Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)). *Id*. This limited circumstance is where a recalcitrant property owner attempts to frustrate the siting process by attempting to avoid service. *Id*., citing ESG Watts. This exception is not applicable here, argues Watson, as neither of the Kellers attempted to avoid service. *Id*. Watson points to the testimony and affidavits of the Kellers and Mr. Jones in support of the fact that the Kellers did not attempt to avoid service.

Watson maintains that posting is not in person service and posting is not substitute service under the Illinois Code of Civil Procedure. Watson Br. at 13. Watson points out that the Board and courts have never decided a case where the personal service requirements of Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)) was found to be satisfied by posting notice. *Id*. Watson asserts that posting service does not include proof that someone actually received the posting. *Id*. A posting could be carried away by the wind or a person, argues Watson. *Id*. Watson argues that even if the Board should find posting of service is sufficient, such form of service should not be found valid in this instance as no evidence of recalcitrance can be found. Watson Br. at 13-14.

Watson also argues that attempts to serve by regular mail are not sufficient to meet the requirements of Section 39.2 (b) of the Act (415 ILCS 5/39.2(b) (2002)). Watson Br. at 14. Thus, the attempt by Waste Management to mail the notice is not sufficient, argues Watson.

**Karlock's arguments**

Karlock adopts the arguments of Watson on the issue of notice pursuant to Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)). Karlock Br. at 6. Karlock notes by way of additional argument that no attempt was made to serve Brenda Keller either by registered or certified mail. *Id*. Instead, Waste Management argued at the siting hearing that personal service

was attempted. *Id*. Karlock asserts that the fact that service was attempted is of no consequence because the facts are that the Kellers did not attempt to evade service. Karlock Br. at 6-7. Karlock points to the testimony of the Kellers that they were home and not on vacation, going about their normal business on the days that the Mr. Jones attempted to serve them. Karlock Br. at 7.

**Karlock's reply**

In reply, Karlock argues that the County's brief "glosses over" the failure to give required notice to Brenda Keller and Waste Management's brief "misses the crucial points". Karlock Reply at 2. Karlock points out that Waste Management seems to first argue that notice sent by regular mail is sufficient and that posted service is sufficient. *Id*. However, Karlock asserts that the plain language of Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)) clearly establishes that service by regular mail is not sufficient. *Id*. Further, Karlock points out that the case cited by Waste Management, to support the argument that posting is sufficient (Greene v. Lindsey 456 U.S. 444 (1982) (Greene)), deals with the limited issue of notices involving continued possession by the owner of the property on which the notice is posted. Karlock Reply at 2-3. Furthermore, Karlock notes that the court found posting not to be sufficient in Greene. Karlock Reply at 3.

Karlock also argues that the case cited by Waste Management for the proposition that certified mail notice is complete upon mailing (People *ex rel.* v. $30,700 U.S. Currency *et al.*, 199 Ill. 2d 142. 766 N.E.2d 1084 (2002) ($30,700 U.S. Currency)) is inapplicable to Brenda Keller. Karlock Reply at 3. The record is clear and the evidence undisputed that Brenda Keller was not notified by certified mail, nor was there an attempt to serve her by certified mail. *Id*.

Karlock argues that neither the County nor Waste Management deny the failure to serve Brenda Keller the required statutory notice. Karlock Reply at 4. Instead Karlock asserts that the County and Waste Management "make numerous excuses for non-service and argue that the Board should accept service alternatives not set forth in the statutes or approved by the courts." *Id*. Finally, Karlock argues that Waste Management misconstrues "knowledge" with "notice" and points out that the court specifically rejected that position in Ogle County. *Id*.

**The City's Arguments**

The City sets forth argument that four individuals were not properly served. The following discussion summarizes those arguments.

**Notice to Merlin Karlock**

The City argues that notice was sent by regular mail to Mr. Karlock on July 29, 2002. City Br. at 3. The City asserts that the record is "bereft of any evidence" that any efforts were made to personally serve Mr. Karlock. *Id*. The City asserts that the statute does not allow for service by regular mail and therefore proper notice was not provided to Mr. Karlock. *Id*.

**Notice to Richard J. Mehrer**

The City asserts that prefiling notice was posted on the door of the residence in Chebanse and Mr. Mehrer was the listed owner of the land. City Br. at 3. Mr. Mehrer is deceased and was deceased at the time the notice was posted; however, personal service was not made on Mrs. Mehrer argues the City. *Id*. No attempt was made to serve the heirs of Mr. Mehrer argues the City and posted service is not authorized by Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)). City Br. at 3-4.

**Notice to Robert and Brenda Keller**

Robert and Brenda Keller are listed on the authentic tax records as owners of property within 250 feet of the proposed expansion and as such were entitled to notice pursuant to Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)), according to the City. City Br. at 4. The City argues that neither was served either by certified mail or personally and neither received prefiling notice. *Id*.

**The City's Reply.** The City argues that Waste Management failed to present any proof that Brenda Keller was served in a fashion required by Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)). City Reply at 2. Further, the record is clear that the Kellers did not evade service. *Id*. The City also argues that Waste Management's reliance on Greene is misplaced, as Waste Management is required to comply with the strict requirements of Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)). City Reply at 3. Finally, the City points out that Waste Management concedes that Brenda Keller was not served by certified mail. City Reply at 4.

**County's Arguments**

The County argues that proper notice to landowners pursuant to Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)) was provided. County Br. at 1. The County answers the arguments by the City as to the four landowners and the arguments of Karlock and Watson to the Kellers. The following discussion will summarize the County's arguments.

**Service on Merlin Karlock**

The County argues that the affidavits and supporting materials provided by Waste Management set forth that Mr. Karlock received, signed and returned a certified mail receipt on July 29, 2002. County Br. at 2, citing C150-346. The County asserts that obviously such service is proper under Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)) as Mr. Karlock was notified 20 days prior to the filing of the application. County Br. at 2. The County maintains that any argument that Mr. Karlock did not receive proper notice must fail. *Id*.

**Service on Richard J. Mehrer**

The County asserts that service on Mr. Mehrer was also appropriate. County Br. at 2. On July 25, 2002, notice was sent to Mr. Mehrer through regular and certified mail. County Br. at 2, citing C150-346. The certified mail receipt was signed and returned to Waste Management and Waste Management then attempted to serve Mr. Mehrer personally although the signed return receipt was sufficient according to the County. County Br. at 2, citing County of

Kankakee v. City of Kankakee, PCB 03-31, 03-33, 03-35 (consld.) (Jan. 9, 2003) (Kankakee 1); DiMaggio v. Solid Waste Agency of Northern Cook County, PCB 89-138 (Jan. 11, 1990) (DiMaggio); City of Columbia v. County of St. Clair, PCB 85-177 (Apr. 2, 1986) (Columbia). The County argues that Waste Management went "an extra step" and served Mr. Mehrer by posting notice. County Br. at 3.

The County also refutes the City's argument that Waste Management should have served the heirs of Mr. Mehrer. County Br. at 3. The County argues that only Mr. Mehrer was listed as the owner of the property on the authentic tax records. *Id*. The County argues that Waste Management "again going above and beyond its duty" attempted to serve Mrs. Mehrer. *Id*. The certified mail receipt was returned unclaimed. *Id*.

**Service on Robert and Brenda Keller**

The County argues that the Board should find the service on the Kellers was proper. County Br. at 3. The County argues that Waste Management tried to serve the Kellers the notice of intent to file nine times, consisting of five attempts at personal service, one by certified mailing, two by regular mail and posting the notice. *Id*. These attempts at service began on July 25, 2002, 22 days before the application was to be filed, according to the County. County Br. at 3-4. The County points out that the Board has approved beginning service attempts eight days prior to the notification deadline. County Br. at 4, citing Columbia.

The County maintains that the petitioners' reliance on Ogle County is misplaced as the court in Ogle County specifically relied on a Supreme Court decision in Avdich v. Kleinert 69 Ill. 2d 1, 370 N.E.2d 504 (1977) (Avdich). County Br. at 4. The County argues that the Supreme Court effectively overruled Avdich in $30,700 U.S. Currency as the holding relates to statutory language requiring notice by "return receipt". *Id*. The County asserts that the Supreme Court contrasted the statutory language "return receipt requested" used in $30,700 U.S. Currency with the statutory language "returned receipt" used in Avdich and held that certified mail notice is complete when mailed if the statutory language is "return receipt requested". County Br. at 3-4. Thus, the County maintains that Ogle County is inapplicable. *Id*.

The County argues that, even if the Board relies on Ogle County, the facts of this case are clearly distinguishable because in Ogle County the applicant did not mail the required notice until three days prior to the notification deadline compared to the eight days here. County Br. at 5. Further the County distinguishes Ogle County because the property owners actually signed the returned receipts after the notification deadline, while in this instance the Kellers did not sign their notice. *Id*. The County states that the court in Ogle County refused to speculate on how it would rule if the notices had not been signed. *Id*.

The County next argues that, after the Board and court's decisions in Ogle County, the Board found that the requirements of Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)) could by met through constructive notice. County Br. at 5, citing ESG Watts. The County quotes the Board's language in ESG Watts, which indicates that if the property owner refuses service prior to the notification deadline, the owner may be deemed to be in constructive notice. *Id*. The County asserts that the facts of this case establish that the Kellers were provided

constructive notice because the Kellers were provided a certified notice on July 25, 2002, two notices were sent by regular mail, five attempts at personal service were made, and finally a notice was posted on their door. County Br. at 5-6. The County maintains that all of these attempts provided constructive notice to the Kellers that an application was to be filed. County Br. at 6.

The County also asserts that the evidence establishes that the Kellers did refuse service. County Br. at 6. The Kellers never attempted to pick up the certified letter and were "conveniently" not home on the five attempts to personally serve the Kellers, argues the County. *Id*. The County also states that the Kellers "allegedly" did not see the notice affixed to the door and never saw the notices sent by regular mail. *Id*. The County asserts that the fact that the certified letter was marked unclaimed rather than refused makes no difference, as there is no logical distinction between a property owner who refuses a certified letter and one who simply fails to pick up a certified letter. *Id*. The County argues that consequently the Kellers should be treated the same as someone who refuses to accept a certified letter and both should be subject to constructive notice. *Id*.

Finally, the County challenges petitioners' assertion that because the notice was not sent to Mrs. Keller, the notice was inadequate. County Br. at 7. The County cites to Wabash and Lawrence Counties Taxpayers and Water Drinkers Association v. PCB, 198 Ill. App. 3d 388, 555 N.E.2d 1081 (5th Dist. 1990) (Wabash) to support the County's proposition. County Br. at 7. The County argues that in that case the court held that notice provided to only one property owner, even though more than one was listed on the authentic tax records, was sufficient. *Id*. Thus, the County maintains that notice to only Mr. Keller only, and not to Mrs. Keller, was sufficient. *Id*.

## Waste Management's Arguments

Waste Management argues that the County Board's factual determination that Waste Management effected service on all record property owners in accordance with Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)) should be reviewed by the Board using the manifest weight of the evidence standard. WMII Br. at 9, citing Land and Lakes. Waste Management asserts that the evidence demonstrates that the notice was provided pursuant to Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002). WMII Br. at 11. Waste Management answers the arguments by the City as to the four landowners and the arguments of Karlock and Watson to the Kellers. The following discussion will summarize Waste Management's arguments.

### Service on Merlin Karlock

Waste Management argues that the record establishes that Mr. Karlock was mailed notice by certified mail and certified mail receipt card was signed for Mr. Randy L. Weger on July 27, 2002. WMII Br. at 11, citing C208-346. Waste Management argues that the law is well settled that service is not defective if someone other than the property owner signs the certified mail receipt. WMII Br. at 11, citing DiMaggio and Columbia. Waste Management states that the original certified mailing slip and the receipt card were inspected by Mr. Karlock's attorney at the siting hearing. WMII Br. at 11-12. Waste Management further states that Mr. Karlock has

not challenged the notice since those material were inspected at the siting hearing. WMII Br. at 12.

**Service on Richard Mehrer**

Waste Management argues that personally serving someone who is deceased is impossible and in this instance Mr. Mehrer is deceased. WMII Br. at 12. Waste Management argues that service was effected however, because the notice of filing was mailed certified mail return receipt requested. *Id*. Such mailing is sufficient according to Waste Management. *Id*.

**Service on Robert and Brenda Keller**

Waste Management argues that the evidence establishes that service was effected on the Kellers by certified mail, regular mail and posted service. WMII Br. at 12. Waste Management argues that notice was sent to Robert Keller on July 25, 2002, via certified mail. WMII Br. at 13. Even though the certified mail receipt was returned unclaimed, Waste Management argues that pursuant to $30,700 U.S. Currency service by certified mail was complete on July 25, 2002. *Id*. Waste Management also argues that service by regular mail was complete on July 29, 2002, because the Board's procedural rules at 35 Ill. Adm. Code 101.300(c) presumes receipt within four days of mailing. *Id*.

Waste Management states that a Mr. Jones was hired to personally serve the Kellers and Mr. Jones attempted to serve the Kellers on five separate occasions. WMII Br. at 13. On one attempt an unidentified woman answered the door but would not accept service, according to Waste Management. WMII at 14. Mr. Jones told the woman he would try later and did so; however, no one was home. *Id*. On the fifth attempt, Mr. Jones posted the notice on the door. *Id*.

Waste Management argues that, prior to Mr. Jones' testimony at the siting hearing, the record contained no information that the notice was posted on the door. WMII Br. at 14. However, Waste Management asserts that Mr. Watson's attorney knew the notice was posted on the door as is evidenced by the motion to declare jurisdiction insufficient, which stated that the "Kellers did not observe the notice posted 'on the door of the Keller's [sic] home'". *Id*. Waste Management argues that the evidence "strongly supports the conclusion that the Kellers saw the notice and conveyed that information" to Mr. Watson. *Id*.

Waste Management concedes that the Board has yet to address the issue whether the posting of notice conspicuously satisfies the requirements of Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)). WMII Br. at 14. Waste Management asserts that the U.S. Supreme Court has "recognized" that posted notice is acceptable particularly for proceedings involving property. *Id*., citing Greene. Waste Management quotes the U.S. Supreme Court which states that "short of personal service . . . posting notice on the door of a person's home would in many or perhaps most instances" be acceptable. WMII Br. at 15, citing Greene.

Waste Management challenges the credibility of the Kellers and argues the credibility of their statements that they did not receive notice by any manner. WMII at 15. Waste

Management points to alleged contradictions in the testimony of the Kellers to support the challenge. WMII Br. at 15-17. Waste Management argues that the lack of credibility of the Kellers distinguishes this case from Ogle County and ESG Watts. WMII Br. at 17.

**Constructive Notice**

Waste Management argues that even if the Board were to determine that Mr. Mehrer and the Kellers did not receive actual notice, Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)) may be satisfied by constructive notice. WMII Br. at 18. Waste Management argues that a "long line" of Board cases has held that actual receipt of notice is not required. WMII Br. at 18. For example, in Columbia, Waste Management argues the Board found that the "cause to be served" language of Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)) does not absolutely require every party actually receive notice 14 days prior to the application being filed. *Id.* Waste Management argues that additional Board cases establish that the Columbia decision is not limited to cases where there are attempts at refusal or deliberate avoidance. *Id.*

Waste Management also cites $30,700 U.S. Currency case and argues that Ogle County was overturned by the Supreme Courts decision in that case. WMII at 19. Waste Management also argues that the Columbia line of decisions by the Board is consistent with $30,700 U.S. Currency. *Id.* Waste Management further points out that in Ogle County the court specifically stated that the court was expressing no opinion whether the potential refusal to accept notice may be held to be constructive notice. WMII Br. at 19.

Based on the $30,700 U.S. Currency and the Board's prior decisions in the Columbia line of cases, Waste Management argues that Mr. Mehrer and the Kellers had constructive notice of the filing of the application. WMII Br. at 21.

Waste Management argues that the attempts to serve the Kellers were diligent. WMII Br. at 21. Waste Management argues that both personal service and certified mail were attempted to effectuate service on the Kellers when only one type of service is necessary. *Id.* Mr. Jones made multiple attempts and when he encountered the unidentified woman Mr. Jones informed her he would return. *Id.* Waste Management argues that the Kellers either chose not to be home or failed to answer the door when Mr. Jones returned, thus evading service. WMII Br. at 22.

Finally Waste Management argues that the attempts to serve the Kellers were initiated sufficiently in advance of filing. WMII Br. at 22. Waste Management asserts that service must be initiated in advance of the notification deadline to reasonably expect that receipt will be had prior to the notification deadline. *Id.* Waste Management argues that attempts at personal service were made 18 days in advance of filing and certified mail was mailed 22 days and the arguments by petitioner that this was not soon enough is wrong. *Id.* Further, Waste Management argues that reading ESG Watts to hold that personal service initiated four days in advance of the deadline is insufficient is an incorrect reading of ESG Watts. WMII Br. at 23.

## DISCUSSION

The issue of whether or not proper notice to landowners was provided under Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)) is a threshold issue in a pollution control siting appeal to the Board. If proper notice procedures were not followed, then the County lacked jurisdiction to hear the siting appeal. The following discussion analyzes the law and reviews the relevant arguments of the parties. The Board then makes findings based on the analysis and review.

Watson and Waste Management disagree on the standard of review the Board should use in deciding the issue of whether or not proper notice was provided to the property owners. Failure to meet the strict notice requirements of Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)) divests the County Board of jurisdiction to hear the matter. Ogle County. The law is well settled that when reviewing a question of law the reviewing court should use the *de novo* standard of review. *See* Panhandle Eastern Pipe Line Company v. IEPA, 314 Ill. App. 3d 296, 734 N.E.2d 18, 21 (4th Dist. 2000). Although Waste Management asserts that the Board should review the County Board's decision regarding the issue of the sufficiency of the notice using the manifest weight of the evidence, the Board disagrees. Clearly whether or not the County Board had jurisdiction is a question of law and therefore the Board will use the *de novo* standard of review.

The plain language of Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)) requires: "No later than 14 days before the date on which the county board . . . receives a request for site 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 . . . 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." The legislature has provided clear and precise language to the Board detailing what steps an applicant must take to provide notice. Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)) has three distinct elements. First, property owners listed on the authentic tax records must be served notice. Second, property owners who own property within 250 feet of the lot line of the proposed facility must be notified. Third, service on those property owners must be effectuated using certified mail return receipt or personal service. In setting forth these elements, the legislature balanced the right of affected citizens to be informed with the necessity of siting landfills in Illinois. The Board today applies the plain language of the statute to determine if Mr. Keller, Mr. Mehrer, Mr. Karlock, and Mrs. Keller were properly served notice.

Waste Management argues that both "posting" notice and notice by regular mail was sufficient notice of an impending landfill siting application. However, the Act envisions two and only two types of service: personal or certified mail return receipt requested. Therefore, the attempts by Waste Management to serve property owners by methods such as sending notice of an application by regular mail and "posting" notice are not authorized by the plain language of Section 39.2(b) of the Act. 415 ILCS 5/39.2(b) (2002). Waste Management cites one case (Greene) on the issue of posting notice as a means of service; however, the United States Supreme Court found in Greene that posting a notice was insufficient even though the statute at issue specifically allowed for posting. The Board has reviewed the case law and can find no case where posting notice was adequate in place of personal service except pursuant to specific statutory language. There are statutes which allow for notice to be posted. *See* 65 ILCS 5/11-

19.2-4, 5/11-31.1-1 and 735 ILCS 5/9-104 and 5/9-107 (2002). However, the plain language of Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)) does not allow for posting of notice. Therefore, the Board finds that "posting" notice is not sufficient to meet the notice requirements of Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)), and notice by regular mail is insufficient based on the plain language of Section 39.2(b) of the Act. 415 ILCS 5/39.2(b) (2002).

Waste Management argues that service by certified mail return receipt requested is sufficient notice based on the Supreme Court's ruling in $30,700 U.S. Currency, which Waste Management asserts overruled the appellate court in Ogle County. Based on the ruling in $30,700 U.S. Currency, Waste Management argues that Mr. Keller, Mr. Mehrer and Mr. Karlock were properly served. The Board has reviewed Ogle County, in which the appellate court ruled that actual receipt of prefiling notice was required to effectuate service under the Act, and the Supreme Court's decision in $30,700 U.S. Currency in which the Supreme Court found mailing of certified mail return receipt requested was sufficient to satisfy notice requirements. Based on that review, the Board is convinced that the Supreme Court's decision in $30,700 U.S. Currency effectively overrules the appellate court's decision in Ogle County. Thus, under Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)), an applicant can effect service by mailing the prefiling notice to property owners certified mail return receipt and the service is proper upon mailing. The Board finds that Mr. Keller, Mr. Mehrer, and Mr. Karlock were properly served.

The County and Waste Management make several arguments that Mrs. Keller was properly served notice. The parties agree that Mrs. Keller is listed on the authentic tax records as a property owner who must receive notice pursuant to Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)). The parties also agree that Mrs. Keller was not served via certified mail. Where the parties disagree is as to whether Mrs. Keller was served personally. However, as the Board stated above, "posting" notice is not one of the two methods for service allowed by statute. Therefore, Mrs. Keller was not personally served pursuant to Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)).

The Board notes that the County and Waste Management also argue that even though Mrs. Keller may not have been served pursuant to Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)), she had constructive notice of the application being filed. The Board in ESG Watts enunciated the concept of constructive notice. In that case the Board found that Ogle County left open the question of whether a property owner can be found in constructive receipt of a notice. In ESG Watts, the Board stated that the Board "believes" that the requirements of Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)) may be met through constructive receipt. ESG Watts at 1999 Ill. ENV. LEXIS 266.

The Board finds that the facts of this case are not analogous to the dicta as set forth in ESG Watts. There is no evidence in the record that Mrs. Keller had constructive notice of the pending application. All of the cases cited to the Board on the concept of constructive notice are cases where the property owner was mailed a prefiling notice of the siting application. In some cases such as Columbia notice was never received but notice was mailed by certified mail. In DiMaggio the property owner was on vacation so did not receive the certified mailing or the document placed under the door before the notification deadline. In this case, Mrs. Keller was

not sent a notice by certified mail. The Board finds that simply sending a certified letter to her husband is not sufficient to find that Mrs. Keller had constructive notice.

The County also argues that under Wabash, service on only one of the property owners listed on the authentic tax records is sufficient pursuant to Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)). The Board disagrees with the County's broad reading of Wabash. In Wabash the court found that only one heir received notice and that was sufficient; however, only that heir was listed by name and address on the tax records. Thus, the court found that the applicant notified the owner of the property appearing from the authentic tax record. Wabash at 198 Ill. App. 3d at 390, 555 N.E.2d at 1084. The Board has also recently determined that notification of only one owner is sufficient. In Kankakee 1 the Board determined that notifying only one of several owners was sufficient when the authentic tax records were contradictory. *See* Kankakee 1 (appeal pending). Both Wabash and Kankakee 1 are clearly distinguishable from this case. The Board finds that Mrs. Keller is undisputedly an owner listed on the authentic tax record and consistent with Wabash and Kankakee 1 is entitled to notice.

In summary, the plain language of the statute establishes that Mrs. Keller was not properly served notice pursuant to Section 39.2(b) of the Act. 415 ILCS 5/39.2(b) (2002). Therefore, because the notice requirements are to be strictly construed (s*ee* Browning Ferris Industries of Illinois v. PCB, 162 Ill. App. 3d 801, 805, 516 N.E.2d 804, 807 (5th Dist. 1987)), the County lacked jurisdiction to review the siting application.

## CONCLUSION

The issue of whether or not proper notice to landowners was provided under Section 39.2(b) of the Act (415 ILCS 5/39.2(b) (2002)) is a threshold issue. Failure to provide notice under Section 39.2 of the Act (415 ILCS 5/39.2(b) (2002)) divests the County Board of jurisdiction in this landfill siting appeal. After a careful examination of the record and the arguments presented by the parties the Board finds that proper notice was not provided to Brenda Keller and the Board will vacate the decision of the County for lack of jurisdiction. The Board further finds that the service on Mr. Keller, Mr. Mehrer, and Mr. Karlock was effectuated using certified mail return receipt. Since, the Board has found that the County Board lacked jurisdiction to review the siting application, the Board need not address the remaining issues regarding fundamental fairness and the criteria raised by the parties.

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

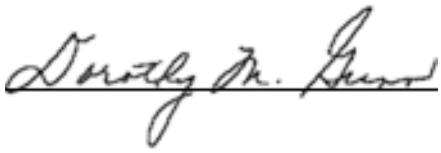
## ORDER

The Board vacates the Kankakee County Board's January 31, 2003 decision granting an application for expansion of a pollution control facility owned and operated by Waste Management of Illinois, Inc. for the facility located in Kankakee County, Illinois.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/31(a) (2002)); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on August 7, 2003, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board